Supreme Court, U.S.
FILED

98 266 AUG 11 1998

OFFICE OF THE CLERK

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

*Petitioner,*

*v.*

JOHN D. WEST, *et al.*,

*Respondents,*

UNITED STATES OF AMERICA,

*Intervenor.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GAIL T. WATSON
*(Counsel of Record)*
SENIOR ASSISTANT
COUNTY ATTORNEY
PHILLIP F. SCHEIBE
COUNTY ATTORNEY
DAVID A. PLYMYER
DEPUTY COUNTY ATTORNEY
2660 Riva Road
Annapolis, Maryland 21401
(410) 222-7888
*Counsel for Petitioner.*

Washington, D.C. • THIEL PRESS • (202) 328-3288

113 P

Page

TABLE OF CONTENTS

APPENDIX A – Order and Opinion of the United States District Court for the District of Maryland, June 22, 1992 ..... 1a

APPENDIX B – Order and Opinion of the United States District Court for the District of Maryland, August 18, 1995 ..... 18a

APPENDIX C – Final Judgment of the United States District Court for the District of Maryland, January 18, 1996 ..... 58a

APPENDIX D – Opinion of the United States Court of Appeals for the Fourth Circuit, February 18, 1998 ..... 75a

APPENDIX E – Order of the United States Court of Appeals for the Fourth Circuit, May 13, 1998 ..... 100a

APPENDIX F – Pertinent Regulations: 29 C.F.R. §553.210; 29 C.F.R. §553.212; 29 C.F.R. §553.215 ..... 106a

APPENDIX G – Pertinent County Charter Provisions: Preamble; §101; §547 ..... 111a

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, etc., et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

### ORDER

In accordance with the Opinion filed today in the above-captioned case, IT IS, this 22nd day of June, 1992, by the United States District Court for the District of Maryland,

ORDERED:

(1) That plaintiffs' Motion for Partial Summary Judgment (Paper 127) BE, and the same hereby IS, GRANTED;

(2) That defendant Anne Arundel County's Motion for Summary Judgment (Paper 126) BE, and the same hereby IS, DENIED; and

(3) That the Clerk shall mail a copy of this Order and the accompanying Opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, etc., et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

Filed: June 22, 1992

Francis J. Collins, Esq. and Andrew H. Kahn, Esq. of Baltimore, Maryland, for plaintiffs.

Catherine Durkan, Esq. of Annapolis, Maryland, for defendant.

BLACK, U.S. DISTRICT JUDGE.

Presently pending before the Court are plaintiffs' Motion for Partial Summary Judgment (Paper 127) and defendant Anne Arundel County's Motion for Summary Judgment (Paper 126). These motions present the following issue: at what point must Anne Arundel County pay overtime compensation in a workweek to employees of the fire department's division of Emergency Medical Services (hereinafter "EMS personnel") – after 40 hours or 53 hours? This issue is apparently one of first impression for a court in the Fourth Circuit.

I

The litigants in this action are locked into a contest over the proper construction of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq* ("FLSA"). In particular,

the parties focus on the Act's overtime compensation provisions. Section 207(a) generally requires all employers to compensate their employees at one and one-half times their regular rate for all hours worked in excess of 40 in any given workweek.[1] This section applies to most state and local government employers.

Recognizing the special needs of government and the unusually long hours of some public safety employees, Congress made certain categories of employee exempt from the 40-hour overtime privilege. With special relevance to this suit, Congress specifically exempted employees in fire protection and law enforcement activities. That exemption, set forth in section 207(k), provides as follows:

> (k) Employment by public agency engaged in fire protection or law enforcement activities
>
> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of *any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions)* if –
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as

---

[1] Section 207(a) provides in pertinent part:

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

> determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(emphasis added). As construed by the Department of Labor ("DOL"), an employee involved in fire protection must work a minimum of 53 hours in a week to earn overtime pay, and an employee in law enforcement must work a minimum of 43 hours. 29 C.F.R. §553.230.

Because of the humanitarian intent behind §207(a), the courts have narrowly construed exemptions like §207(k). *Johnson v. City of Columbia,* 949 F.2d 127, 129-30 (4th Cir. 1991); *Donovan v. Brown Equipment & Service Tools, Inc.,* 666 F.2d 148, 153 (5th Cir. 1982). Indeed, exemptions "ought to be applied only in those circumstances which plainly and unmistakably come within their terms and spirit." *Donovan v. Bereuter's, Inc.,* 704 F.2d 1034, 1036 (8th Cir. 1983). Thus, the burden is on defendant to show that it is entitled to exempt a certain classification of employee. *Johnson,* 949 F.2d at 130. *Carlson v. City of Minneapolis,* 925 F.2d 264, 265 (8th Cir. 1991).

## II

Anne Arundel County triggered this action by classifying over 100 EMS personnel as exempt because they are employed by the fire department and their work relates to the department's fire protection activities. The County does not assert here that plaintiffs fall within the law enforcement provisions of the statute. Instead, the County exclusively focuses on "fire protection activities" as defined by regulations promulgated by the DOL.

The County asserts that the Court can resolve this issue solely on the basis of 29 C.F.R. §553.210 which states:

> Fire protection activities
>
> (a) As used in [section 207(k) . . . of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . *The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.*
>
> . . . .
>
> (c) Not included in the term "employee in fire protection activities" are the so-called "civilian"

> employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

(emphasis added). In construing this section, the County contends that the four enumerated factors of subsection (a) do not apply to EMS personnel. Instead, the County bases its case on the highlighted sentence, with its "integral part" language.

To clarify this term, the County focuses not on plaintiffs' participation in "fire protection activities" but on their close association with the fire department. The County does not define "integral part" by reference to §553.215, a section which is cross-referenced, since it relates on its face to ambulance and rescue service employees who are not employed by a fire department.[2] At most, the County asserts, this notation simply points to a related but irrelevant section of the regulations. Thus, the County's interpretation of §553.210(a) focuses

---

[2]C.F.R. §553.215 provides:

> (a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by [section 207(k) of the Act] . . . if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective [sic] duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

on the plaintiffs' integration into the structure and activities of the fire department.

Pursuant to this construction, the County contends that plaintiffs are similar to firefighters because they share the same employer, the fire department. In addition, the County notes that plaintiffs are integrated into the department by a unified command structure, fire academy training, shared facilities, representation by the same union, and the common purpose of assisting the community. Finally, the County alludes to the frequent co-responses of firefighters and EMS personnel to various incidents.

At the outset, plaintiffs assert that the Court should decide this issue by interpreting only the statutory language. They contend that Congress, in passing 29 U.S.C. §207(k), explicitly chose to exempt firefighters and law-enforcers, *not* EMS personnel. Nonetheless, plaintiffs do recognize that the Court has the responsibility to interpret administrative regulations that reasonably construe the statute and, accordingly, plaintiffs respond to the regulations cited by the County.

Confronting the language of §553.210(a), plaintiffs first assert that they do not qualify as "rescue or ambulance service personnel." Plaintiffs also contend that their work is not integral to the activities of fire protection as required by the last two of the four enumerated factors set forth in §553.210(a), namely, the prevention, control or extinguishment of fires. As an alternative, plaintiffs follow the direction of "See §553.215," which essentially leads to two conditions for triggering an exemption for ambulance and rescue service employees: 1) they must have been trained to rescue, and 2) they must have been regularly dispatched to fires, crime

scenes, riots, natural disasters, and other accidents.[3] Although the County does not rely on §553.215 as previously set forth, plaintiffs assert that the County fails to satisfy either condition.

Even if plaintiffs are found to form an integral part of the fire department's fire protection activities, they claim nonexemption on the basis of 29 C.F.R. §553.212, which provides in pertinent part:

> (a) Employees engaged in fire protection . . . activities as described in §553.210 . . . may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection . . . activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat . . . the section . . . [207(k)] exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection . . . activities for purposes of this part.

Relying on this provision, plaintiffs uniformly represent that more than 90 percent of their work is unrelated to fire protection. On this basis alone, plaintiffs move the Court to grant their motion for partial summary judgment.

---

[3] *See supra* note 2.

III

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3186 (1990). Under the strict standard of the Fourth Circuit, summary judgment is proper only when the parties agree on both the facts *and* the inferences drawn from those facts. *Morrison v. Nissan Co., Ltd.,* 601 F.2d 139, 141 (4th Cir. 1979).

The Court must thus decide whether a reasonable jury could find in favor of the non-moving party, taking all factual inferences in the light most favorable to the non-movant. *Helm v. Western Maryland Railway Co.,* 838 F.2d 729, 734 (4th Cir. 1988); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). It should be noted, however, that "the judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson,* 477 U.S. at 249; *see Miller v. Leathers,* 885 F.2d 151, 154 (4th Cir. 1989), *cert. denied,* 111 S.Ct. 1018 (1991). Instead, the Court must simply decide whether there is a genuine issue for trial.

IV

In order to determine which facts are material in this action, the Court must sift through the parties' conflicting legal theories and identify the applicable rule of law.

The Court finds that the statutory language does not expressly bring EMS personnel within the terms of an exemption. Indeed, Congress specifically exempted employees involved in fire protection and law enforcement activities, *not* those engaged in medical services

generally. If Congress truly wished to expand the reach of its exemption, it could have used more general language, such as "emergency response activities."[4]

It is well settled that Congress, by expressly excluding certain categories from a statute's coverage, demonstrates an intent to include all others. *See e.g., Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 188 (1978); *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir. 1980), *cert. denied*, 449 U.S. 954. This principle of inclusion is especially important in the context of FLSA, for which the courts have traditionally drawn narrow exemptions. *See supra* p. 3. Thus, this Court has serious reservations about reading §207(k) expansively to exempt EMS personnel from the 40-hour overtime requirement. Nonetheless, the Court finds it appropriate to look to the DOL for guidance, provided the agency has reasonably construed the statute. *See Donovan v. KFC National Management Co.*, 682 F.2d 603, 604 (6th Cir. 1982). Such an approach is warranted by the acknowledged expertise of the DOL in dealing with labor issues.

In 29 C.F.R §553.210, the DOL has construed the term "any employee . . . in fire protection activities" to

---

[4]The legislative history of this statutory provision is scarce. The most substantive interpretation was made in 1974 by the ranking member of the House General Labor Subcommittee, who expressed the belief that ambulance and rescue personnel fall within the exemption. Because the remarks of a single legislator hardly control a determination of congressional intent, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), this Court must generally treat the legislative history as inconclusive. For a full text of the legislator's remarks, see *Horan v. King County Division of Emergency Medical Services*, 740 F. Supp. 1471, 1476 n.3 (W.D. Wash. 1990).

refer to individuals who satisfy a four-prong test. In addition, "the term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215." Reading this last sentence, it might appear that the substance of an "integral part" test can be derived from the language of either §553.210 or §553.215. At the outset, the Court should indicate its reluctance to delve into and apply the complexities of §553.215, a provision that neither party genuinely invokes. Moreover, the "See §553.215" notation merely serves to refer the reader to a related regulation that applies to ambulance and rescue personnel of a public agency other than a fire department. Because plaintiffs are employed by the fire department, §553.215 is inapplicable by its own terms.[5] The Court shall therefore focus its attention on the internal language of §553.210.

In order to identify the substance of an "integral part" test within the contours of §553.210, the Court can either rely on the four enumerated factors or develop a separate and independent set of factors. Upon analysis, however, the Court concludes that a fire department's rescue and ambulance personnel must satisfy the four factors. In reaching this conclusion, the Court depends on a common sense interpretation of the regulatory language. For example, the drafters of the regulation chose to generally describe the term, "any employee . . . in fire protection activities," as referring to anyone who fulfills

---

[5]Accordingly, the two cases cited by defendant, *Bond v. City of Jackson*, 939 F.2d 285, 287 (5th Cir. 1991), and *O'Neal v. Barrow County Board of Commissioners*, 743 F. Supp. 859, 862 (N.D. Ga. 1990), rely primarily on §553.215 and are similarly inapposite.

the four factors. The drafters then noted that "the term would also include rescue and ambulance service personnel [who] form an integral part of . . . fire protection activities." If the drafters truly wished to articulate a separate set of factors for ambulance personnel, they would not have opted for the word, "include." Because inclusion connotes similar treatment, the Court must apply the four factors to plaintiffs to determine whether they form an integral part of fire protection activities.

The County attempts to ignore these four factors and instead adopts a separate "integral part" test, which concentrates on the integration of EMS personnel into the fire *department*. The Court finds the County wrong on multiple grounds. First, the statutory and regulatory language expressly emphasizes an employee's activities – not his or her mere employment by the fire department. In addition, numerous courts have emphasized the primacy of function over form. *Carlson*, 925 F.2d at 265; *Reeves v. I.T.& T. Corp.*, 357 F. Supp. 295, 302-303 (W.D. La. 1973), *aff'd*, 616 F.2d 1342, 1351 (5th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). Finally, the County's free-wheeling interpretation has been rejected even by the DOL, which supports the view that the work of ambulance personnel must be substantially related to "fire protection activities."

(Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2022 (1987)).

If plaintiffs in some manner satisfy these four factors, the County must further demonstrate under §553.212 that plaintiffs spend 80 percent or more of their time performing work that is an incident to or in conjunction with fire protection activities. If the County fails, the plaintiffs are entitled to overtime compensation after working forty hours in a week. In defining "fire protec-

tion activities," the Court finds most instructive the fourth factor of §553.210, which refers to activities "which are required for, and directly concerned with, the prevention, control or extinguishment of fires."

The County makes the surprising contention that §553.212 does not apply to EMS personnel. Not only is such an argument contrary to judicial authority, *Spires v. Ben Hill County*, 745 F. Supp. 690, 699 (M.D. Ga. 1990); *Horan v. King County Division of Emergency Medical Services*, 740 F. Supp. 1471, 1479 (W.D. Wash. 1990), but it ignores the structure and language of the regulations themselves. For example, §553.212 expressly relates to employees engaged in fire protection activities as described in §553.210. Moreover, the County glosses over the fact that former Secretary of Labor Elizabeth Dole has highlighted the importance of calculating the time an EMS employee devoted to fighting fires.[6] For all of these reasons, the Court cannot adopt the County's tenuous assertion.

V

Having identified the relevant legal standards, the Court is now prepared to apply the law to the facts. At the outset, plaintiffs have conceded that the County has met its burden of proving that they satisfy the first three factors of §553.210. (Plaintiffs' Response to the County's Motion, at 8). In other words, plaintiffs do not

---

[6]In a letter ruling of August 2, 1990, Secretary Dole held a county in violation of labor regulations for improperly including some emergency medical service (EMS) employees within the definition of fire protection. Specifically, her "investigation disclosed that the EMS employees did not spend the *majority* of their work time during each work period in EMS service related to fire-fighting activities." (emphasis added). Ltr. Rul. (Aug. 2, 1990), *printed in* Fair Labor Standards Handbook 289-90 (ed. Mar. 1991).

dispute their employment by the fire department, their training, and their legal authority to fight fires. Plaintiffs, however, disagree that they perform "activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires" – the fourth factor. In order to evaluate this assertion, the Court must examine the general duties of the EMS personnel.[7]

John West, the lead plaintiff, whose experience is roughly similar to all plaintiffs, has stated by way of affidavit that his job typically consists of

> preparing for medical emergencies, traveling to medical emergencies, stocking the ambulance or emergency medical vehicle, administering first aid and other medical care in emergency medical situations, transporting patients to hospitals, cleaning and maintaining the ambulance and station, attending training sessions, studying emergency medical procedures and waiting to be called on emergency medical calls.

(Plaintiffs' Motion for Summary Judgment, Exhibit 1, para. 5). This focus on medical service obligations (as

---

[7] In interpreting this fourth factor, the Court finds instructive the ruling in *Carlson v. City of Minneapolis*, 925 F.2d 264 (8th Cir. 1991). In *Carlson*, a case concerning arson investigators, the Eighth Circuit vividly demonstrated that an employee's mere association with fires is insufficient to fall subject to the exemption:

> [W] e agree with the district court that the investigators do not engage in fire protection activities. Although the investigators work for the Minneapolis Fire Department, are assigned to fire stations, respond to fire calls, and spend time at fire scenes, they do not "perform [] activities [that] are required for and [are] directly concerned with the prevention, control, or extinguishment of fires. . . ." 29 C.F.R. §553.210(a)(4).

925 F.2d at 265.

opposed to fire suppression duties) is confirmed by the official job description, which indicates that an "emergency medical technician paramedic"

> [p]erforms necessary emergency medical care on sick, injured, or convalescent persons at the site of the incident and enroute to the hospital or other destination . . . , [sic] places patient on stretcher and loads stretcher into ambulance; subdues violent patients; may drive ambulance, using knowledge and skill in driving to avoid sudden motions detrimental to patients; maintains ambulance, medical service equipment and living quarters; participates in specialized training courses.

(Plaintiffs' Motion, Exhibit 5: McNichol Exhibit 7, at 15.10.a.2). Moreover, even the Battalion Chief of the Fire Suppression Division, Stuart McNichol, has stated that plaintiffs' primary role is to provide emergency medical care. (Plaintiffs' Motion, Exhibit 4, at 51-52).

Despite this overall emphasis on medical services, the job description provides tangentially that EMS personnel also perform fire and rescue work. (Plaintiffs' Motion, Exhibit 5: McNichol Exhibit 7, at 15.10.1.6). In addition, West has admitted that on rare occasions he entered burning buildings or provided "minor outside firefighting assistance." (Plaintiffs' Motion, Exhibit 1, paras. 11, 14) Many of the other plaintiffs have had similar experiences. Therefore, because most plaintiffs may have minimal involvement in preventing, controlling, or extinguishing fires, the fourth factor of §553.210 may appear to be satisfied.

The analysis, however, does not end with the bare language of these four factors. Indeed, the County must further demonstrate that plaintiffs spend 80 percent or more of their time performing work that is an incident

to or in conjunction with fire protection activities. As the facts reveal, even assuming that every plaintiff satisfies the language of the fourth factor, not one plaintiff meets this 80 percent requirement.

On an individual basis, each plaintiff has stated in an affidavit that

> [s]ubstantially less than 20% of my time at work is spent performing activities which are required for and directly concerned with the prevention, control or extinguishment of fires even when including such incidental non-fire fighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.

In addition, a statistical study of five months in 1990 revealed only one incident related to fire suppression or rescue activities. (Plaintiffs' Motion, Exhibit 3). Moreover, the fire department's annual reports from 1987 through 1989 show that plaintiffs were involved in fire-related activities for less than 10 percent of their time. (Plaintiffs' Motion, Exhibit 6). And even Battalion Chief McNichol admitted that EMS personnel spend less than 50 percent of their time involved in fire protection activities. (Plaintiffs' Motion, Exhibit 4, at pp. 98-99).

Based upon this unrefuted evidence, the Court concludes that the County falls far short of establishing the requisite 80 percent needed to transform EMS personnel into firefighters. Therefore, in light of both §§553.212 and 553.210 and the Court's obligation to construe

strictly any exceptions to customary overtime compensation, the Court denies the County's motion for summary judgment and grants plaintiffs' motion for partial summary judgment.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Chief Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, on behalf of himself and
all other employees of Anne Arundel County Maryland
similarly situated, et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

ORDER

In accordance with the opinion filed today in the above-captioned case, IT IS, this 18th day of August, 1995, by the United States District Court for the District of Maryland,

ORDERED:

(1) That plaintiffs' Motion for Summary Judgment (Paper 150) BE, and the same hereby IS, GRANTED IN PART and DENIED IN PART, as follows:

(a) The motion is granted in regard to overtime compensation for all of the plaintiffs;

(b) The motion is granted in regard to plaintiffs' claim for prejudgment interest; and

(c) The motion is denied in all other respects;

(2) That defendant's Cross Motion for Summary Judgment (Paper 151) BE, and the same hereby IS, GRANTED IN PART and DENIED IN PART, as follows:

(a) The motion is granted in regard to plaintiffs' claim for liquidated damages;

(b) The motion is granted in regard to the application of the two-year statute of limitations;

(c) The motion is denied in all other respects; and

(3) That the Clerk shall mail a copy of this order and the accompanying opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

---

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, on behalf of himself and
all other employees of Anne Arundel County Maryland
similarly situated, et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

Filed: August 18, 1995

Francis J. Collins, Esq., and Andrew H. Kahn, Esq., of Baltimore, Maryland, for plaintiffs.

Catherine Durkan, Esq. of Annapolis, Maryland, for defendant.

BLACK, JR., WALTER E., DISTRICT JUDGE

Presently pending before the Court are plaintiffs' Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment. This lawsuit was filed by more than 100 Emergency Medical Service Personnel (hereinafter "EMS personnel") of the Anne Arundel County Fire Department seeking compliance with the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. §207(a)(1). On a previous summary judgment motion, the Court determined that EMS personnel were not employees engaged in fire protection activity under the provisions of §7(k) of the Act, 29 U.S.C. §207(k), and therefore that the County must pay overtime after 40 hours rather than after 53 hours.

These cross motions for summary judgment address all remaining issues regarding overtime compensation. Plaintiffs contend that they are due overtime compensation for all hours worked in excess of forty hours per week because they do not fall within the exemptions from overtime for professional, executive, or administrative employees. The County agrees that Emergency Medical Technicians, Cardiac Rescue Technicians (CRTs), and EMS Lieutenants, other than EMS Field Lieutenant and EMS Training Lieutenant,[1] do not fall within any of the exemptions from the requirements; however, the County contends that all captains are exempt as executives or administrators, that Field Lieutenants are exempt as executives, that Training Lieutenants are exempt as administrators, and that all plaintiffs with paramedic certification are exempt as professionals. Plaintiffs also contend that they are entitled to liquidated damages and a three year statute of limitations, while defendants argue that liquidated damages are inappropriate, and that the correct statute of limitations is two years.

I

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §207(a)(1), requires that employees be paid time and a half for work over 40 hours per week. Section 13(a)(1) exempts from that requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). The burden of proving that an employee is exempt from the overtime

---

[1] The ranks of EMS personnel involved in this litigation are: EMS Captain-Operations, EMS Captain-Training Coordinator, EMS Captain-Duty Officer, EMS Field Lieutenant, EMS Training Lieutenant, EMS Lieutenant, Emergency Medical Technician Paramedic, Cardiac Rescue Technician, and Emergency Medical Technician.

requirement is on the employer. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). Overtime exemptions are construed narrowly, against the employer. *Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th Cir. 1994). This burden must be satisfied by clear and affirmative evidence. *Clark v. J. M. Benson Co., Inc.*, 789 F.2d 282 (4th Cir. 1986); *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984).

As the County is claiming exemptions under the executive, administrative, and professional exemptions, it is necessary to review the regulations pertaining to both of those exemptions. The regulations provide both "long" and "short" tests to determine whether an employee fits within the applicable exemption. *See* 29 C.F.R. § §541.1, 541.3. The long test for both exemptions applies to lower-paid employees, while the short test applies to employees making at least $250 per week. *Id.* Because both sides agree that all plaintiffs earn at least $250 per week, the short test applies for both exemptions.

An employer is exempt from the requirement of paying overtime under the short test to a professional employee

> who is compensated on a salary or fee basis at a rate of not less than $250 per week . . . and whose primary duty consists of the performance either of work [requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes] . . . , which includes work requiring the consistent exercise of discretion and judgment . . . .

29 C.F.R. §541.3(e). The short test for an executive exempts an employee

> who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein . . . .

29 C.F.R. §541.1(f). The short test for an administrative employee exempts one who

> is compensated on a salary or fee basis at a rate of not less than $250 per week . . . and whose primary duty consists of [the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers], which includes work requiring the exercise of discretion and independent judgment.

29 C.F.R. §541.2(e)(2). As all exemptions require that an employee be paid on a salary basis, the Court will address that issue first.

*Salary Basis*

The definition of a salaried employee, 29 C.F.R. §541.118(a), states

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality of the work performed. Subject to the

> exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

The regulations then provide three exceptions to the rule that employees must be paid their full weekly salary to qualify for an exemption from overtime: (1) deductions are permissible when the employee is absent for a day or more for personal reasons; (2) deductions are permissible, in accordance with a bona fide plan, when the employee is absent for a day or more for sickness or disability; and (3) penalties for "infractions of safety rules of major significance" are permissible. 29 C.F.R. §§541.118 (a)(2), (3) and (5). Deductions for absences due to jury duty, temporary military leave, or attendance as a witness are impermissible. 29 C.F.R. §541.118 (a)(4). Until September 18, 1992, deductions for partial day absences were impermissible for salaried employees. *See* 57 Fed. Reg. 37,666 (1992). However, at that time, due to concern that paying public sector employees for time they did not work was incompatible with public accountability, the Department of Labor issued a new regulation permitting deductions for absences of less than one work-day for public employees. 29 C.F.R. 541.5d.

Here, the peculiarities of a collective bargaining agreement give the pay scheme attributes of both an hourly and a salary basis. Many courts have struggled with the difficult task of applying rules designed for the private sector to employees of public agencies. In fact, several courts and judges have ruled that part or all of the salary basis test is invalid as applied to the public sector. *See Service Employees International Union, Local 102 v.*

*County of San Diego*, 35 F.3d 483 (9th Cir. 1994), *as amended on denial of rehearing*, 1994 U.S. App. LEXIS 40787 (9th Cir. July 19, 1995); *Hilbert v. District of Columbia*, 23 F.3d 429, 435 (D.C. Cir. 1994) (Henderson, J. concurring in part, dissenting in part); *McGrath v. City of Philadelphia*, 864 F. Supp. 466, 486 (E.D. Pa. 1994); *Stewart v. City and County of San Francisco*, 834 F. Supp. 1233, 1238 (N.D. Cal. 1993).

The basis for the Ninth Circuit's ruling in *Service Employees* is as follows: The Department of Labor regulations formulating the salary test were enacted in 1954, when the FLSA did not apply to public employers. In 1974, Congress amended the FLSA to cover public sector employees. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6, 88 Stat. 55, 59-63. However, in 1976, the Supreme Court ruled that the application of FLSA to public employees was unconstitutional. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In 1985, the Supreme Court reversed itself in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and Congress once again amended the FLSA. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787. In these amendments, Congress did not address the issue of whether the salary test should apply to public employees. Congress did state that "the bill extends minimum wage and overtime coverage to about 5 million *nonsupervisory* employees in the public sector." H.R. Rep. No. 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837. The Ninth Circuit has interpreted that statement to mean that Congress intended public agencies to have the benefit of the executive and administrative exemptions. *Service Employees*, 35 F.3d at 487.

Thus, in 1986, public agencies were faced with the difficult task of complying with regulations that were enacted for private sector employers. In 1987, the Department of Labor recognized the problem and stated that it would not enforce that part of the salary basis test prohibiting deductions for absences of less than a day as to public employers. *See* 57 Fed. Reg. 37,668 (1992). Employees, on the other hand, were still permitted to file suit. *Id.* A wave of public sector employee lawsuits ensued and, in 1991, the Department of Labor issued an interim regulation altering part of the salary basis test for public employees, retroactive to April 16, 1986. 56 Fed. Reg. 45,824 (1991). In particular, the interim regulation permitted deductions for absences of less than one workday and permitted deductions caused by budget-required furloughs. *Id.* However, the interim regulation left all other aspects of the salary basis test unchanged as applied to public employers. *See* 57 Fed. Reg. 37,670 (1992). The interim rule was implemented without prior notice and comment because the Secretary of Labor found good cause to issue the rule without delay. *See id.* In several lawsuits, to which the Department of Labor was not a party, district courts ruled that the interim regulation was invalid for failure to comply with the notice and comment procedures of the Administrative Procedure Act. *See, e.g., Service Employees International Union, Local 102 v. County of San Diego,* 784 F. Supp. 1503 (S.D. Cal. 1992), *rev'd,* 35 F.3d 483 (9th Cir. 1994); *Alex v. California,* 1992 U.S. Dist. LEXIS 6795 (E.D. Cal. 1992). Although the Department of Labor disagreed, it withdrew the interim rule and instead issued the 1992 rule after following the Administrative Procedure Act. *See* 57 Fed. Reg. 37,672 (1992). Unlike the 1991 rule, the 1992 rule is not retroactive because the Department of Labor was concerned that a retroactive rule would be

invalid under *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), and its progeny, which held that a retroactive regulation is only valid if expressly authorized by Congress. *See* 57 Fed. Reg. 37,678 (1992).

The Court in *Service Employees* ruled that the Department of Labor's "interest in applying the new salary test retroactively is indicative of its firm conviction that its earlier iteration of the salary test conflicted with congressional intent." 35 F.3d at 489. The Ninth Circuit also relied on the fact that Congress intended that public agencies have the benefit of the executive and administrative exemptions from the overtime requirement, but that the salary basis test essentially deprived the public sector of these exemptions. *Id.* at 488-89. Therefore, the Court ruled that the salary basis test is invalid, in its entirety as applied to the public sector, as conflicting with the intent of Congress and thus "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" pursuant to the Administrative Procefure Act, 5 U.S.C. §706(2)(a). *Id.* at 489. *See Stewart*, 834 F. Supp at 1238. Because the Department of Labor stated that the partial-day docking rule was inappropriate when applied to the public sector, the County urges the Court not to apply this portion of the salary basis test here.

The Court agrees and finds as it did in the companion case, *Quirk v. Baltimore County*, Civil No. B-90-2983, that the partial-day docking rule is inconsistent with the intent of Congress and therefore invalid pursuant to *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the test set forth in *Chevron*, the Court must first look to see if the intent of Congress is clear on the question of whether the salary basis test should apply to the public sector. *Id.* If it is clear, the Court must "reject administrative construc-

tions which are contrary to clear congressional intent." *Id.* at 843, n.9. Where, as here, congressional intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 483. Courts give substantial deference to the expertise of an agency charged with the administration of a statute. *See, e.g. Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380 (1984).

This Court relies on the fact that the expert agency assigned to implement the Fair Labor Standards Act examined the regulations and found them inconsistent with the statute:

> With regard to the public sector . . . it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)-(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

57 Fed. Reg. 37,670 (1992). The Department of Labor also stated:

> It had become apparent to the Department . . . that the previously existing rules and enforcement policy

> were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the expressed intent of Congress in the 1974 Amendments.

57 Fed. Reg. 37,671 (1992). In fact, the Department found the rule for partial-day absences ("docking rule") so inconsistent with the intent of Congress, that it attempted to promulgate a rule to make §541.5d operate retroactively. *See* 56 Fed. Reg. 45,829 (1991). Only the limited power of an executive agency to issue retroactive regulations prevented the Department from effectively eliminating the docking rule. The Department of Labor itself has determined that its regulation was not based on a permissible construction of §13(a). This Court, likewise, finds that because the docking rule was contrary to the expressed intent of Congress, the regulation is invalid as arbitrary, capricious, an abuse of discretion, and otherwise not in accord with the law.

However, as to the remainder of the salary basis test, the Court finds that the expert agency entrusted with interpreting the FLSA has examined the statute and regulations and determined that other aspects of the salary test could be applied to the public sector without unduly restricting the exemption. *See* 57 Fed. Reg. 37,673 (1992). While the salary basis test is clearly far from ideal and rather impracticable when applied to the public sector, there is no indication that it is not *a* permissible construction of the statute. The Court therefore defers to the Department of Labor's expertise and rules that the remainder of the salary basis test is not arbitrary and capricious.

In so doing, the Court declines to apply the ruling in *Service Employees* that the salary test was invalid in its

entirety. This conclusion is flawed, in part because it is based on the finding that the Department of Labor's "non-enforcement policy covered the entire salary test, not just part of it; and essentially no valid salary test applicable to the public sector existed until the DOL finally conducted rule-making in 1991 and 1992." *Service Employees* at 489 *as amended on denial of rehearing.* This finding is in error, since the enforcement policy issued by the Wage and Hour Administrator on January 9, 1987, was limited to the denial of "an exemption . . . to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident . . . ." 57 Fed. Reg. 37668. Instead, this Court adopts the reasoning of Chief Judge Posner in *Mueller v. Reich,* 54 F.3d 438 (7th Cir. 1995), namely, that after the promulgation of 29 C.F.R. §541.5d effective September 18, 1992, the requirements in the regulations are valid, thereby limiting any invalidity solely to the docking rule in regard to absences of less than a day for personal reasons or because of illness or accident.

As most of the salary basis test is still applicable to plaintiffs, the Court will examine the pay schedules set forth in the union contract to determine whether plaintiffs are being compensated for the quality or quantity of work performed. Article 12.2 of the union contract specifies that an employee's "regular wages shall be the annual salary for such employee's pay step within the pay grade assigned to the employee's regular job classification." Appendices II and III to the contract set forth annual salaries for steps 1 through 12 within grades F1 through F6. EMS personnel have an average workweek of 50 hours based on a schedule of 24 hours on duty followed by 48 hours off duty. The annual salary is therefore divided into 26 equal payments, based on 50 hours

of work per week, so that plaintiffs receive a predetermined base amount every two weeks. Although no hourly rate appears in the appendices, an hourly rate of pay is derived based on a 50 hour workweek. Plaintiffs are paid a base salary for 100 hours every two weeks, although in some pay periods they work less than 100 hours. The schedule works out to a regular repetitive pattern of 48 or 60 hours per week.

The pay scheme appears to have some hourly aspects. For example, plaintiffs receive overtime based on an hourly rate of pay when they work beyond their normal shifts or work on their scheduled days off. They receive out-of-class pay at an increased hourly rate if they substitute for another employee in a higher class. They receive an hourly shift differential for work at night. However, overtime alone does not make plaintiffs hourly employees. The regulations provide that additional compensation does not alter the status of salaried employees. 29 C.F.R. §541.118(b). The Fourth Circuit has interpreted this to mean that overtime does not defeat an otherwise authorized exemption for a salaried employee. *Hartman v. Arlington County,* 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd. on reasoning of lower court,* 903 F.2d 290 (4th Cir. 1990).

The pay scheme here is similar to that in *Simmons v. City of Fort Worth, Texas,* 805 F. Supp. 419 (N.D. Tex. 1992), in which the Court ruled that district and deputy fire chiefs were salaried employees under the Fair Labor Standards Act. Plaintiffs in that case worked particular shifts; they were on duty for twenty-four hours and off-duty for forty-eight hours. However, they received a bi-weekly pay check for eighty hours regardless of the time worked. Likewise, in *Masters v. City of Huntington,* 800 F. Supp. 363 (S.D. W. Va 1992), the Court ruled that

deputy fire chiefs and captains were paid an annual salary. Their pay schedules set forth hourly rates of pay, but to arrive at the amount owed bi-weekly, the City divided their annual salaries by twenty-six, the number of pay periods in a year. They were paid the same base salary whatever they worked between 96 and 144 hours during the pay period. They were, however, paid for work beyond their regularly scheduled shifts on an hourly basis. Following Fourth Circuit precedent, the Court ruled that additional pay at an hourly rate does not defeat the exemption, because it is expressly permitted by the regulations. *Id.*

If the analysis were to end here, the Court would rule that plaintiffs are paid on a salary basis. They receive a minimum predetermined amount every two weeks, plus additional compensation in the form of overtime. They are paid for 50 hours of work each week, even if they only work 48 hours. All shift differentials work to plaintiffs' benefit; none reduce their salaries based on the quantity of work performed. However, the analysis does not end here, as the regulations specify other requirements for salaried employees.[2]

---

[2] Plaintiffs argue that their salaries are impermissibly docked for maternity leave and for appearance as witnesses in court in non-work related matters. However, these arguments are without merit. The County has a bona fide plan which provides paid disability leave. Under the plan, maternity leave is treated like any other disability. Deductions for illness absences of more than a day are permissible under 29 C.F.R. §541.118(a)(3). Likewise, the County provides paid court leave for jury duty or attendance as witness in a case related to employment with the County. Sections 13.3, 13.4. The Fourth Circuit has ruled that an employer need not provide paid leave for an employee to engage in personal litigation. *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993).

First, plaintiffs argue that their salaries are reduced, in violation of the regulations, when they are absent on temporary military duty. *See* 29 C.F.R. 541.118(a)(4). The union contract provides 20 days of paid military leave. The County has submitted no evidence regarding the consequences if an employee's military obligation exceeded 20 days. Presumably, an employee could use any available leave time, but would be required to take leave without pay after exhausting accrued leave. Neither side has indicated whether any plaintiff was ever docked for military leave over 20 days.

The Court has found no legal authority as to the meaning of "temporary military leave" either in the regulations or applicable case law. The County provides 20 days of paid military leave, and there is nothing in the record before the Court which establishes that military leave beyond 20 days is nevertheless temporary. The County's military leave policy is clearly reasonable to cover the usual situations involving an employee's annual summer National Guard duty or an emergency activation to meet the needs of some natural disaster or riot conditions. It would be a strained interpretation of the word "temporary" to apply it to a full scale mobilization of the Armed Forces or to service in time of war. Accordingly, the Court finds that the County has not violated 29 C.F.R. §541.118(a)(4) in regard to temporary military leave. In any event, §541.118(a) adopts the general rule "that an employee need not be paid for any workweek in which he performs no work." Consistent with this general rule, the County would not be required to pay its employees on full-time military duty during their absence for that purpose.

Second, the Court must address plaintiffs' position that the County policy permitting the docking of pay for

infractions, other than infractions of safety rules of major significance, also constitutes an impermissible deduction of salary.[3] The Fourth Circuit has ruled that "disciplinary reductions in pay, other than for violations of major safety rules, constitute reductions in pay based on the quantity and quality of the employee's work." *Shockley v. City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1993). In his affidavit, plaintiff John West states "Plaintiffs . . . are subject to deduction of wages for disciplinary matters involving less than 'infractions of safety rules of major significance.' "[4] Defendants have submitted the affidavit of Stephen Halford, Deputy Chief, Administration for the Anne Arundel County Fire Department who states that "[t]here has been no occasion when an exempt Lieutenant or Captain has been subjected to a disciplinary suspension of less than one week." Defendants have not submitted any evidence regarding such deductions for paramedics. In this regard, Fourth Circuit authority is lacking since it is not clear whether any plaintiff in *Shockley* actually was docked for the minor rule infraction at issue, namely, failure to report absence from work.

Thus, the question is whether being subject to an impermissible reduction is sufficient to defeat the exemp-

---

[3] Unlike reductions for partial day absences, the 1992 amendment to the regulations did not alter the prohibition on deductions for minor infractions for public employees. 57 Fed. Reg. 37674 (1992) (Department of Labor found "no sufficient basis for distinguishing between the public and private sectors in regard to deductions for safety infractions").

[4] The Court notes with interest that, in the same paragraph of the affidavit, West states that plaintiffs are "docked" for absences of less than one day and excess maternity leave in contrast to the use of the words "subject to deduction" in the portion quoted in the text.

tion. Several courts have held that if an employee's pay can theoretically be docked under the applicable pay scheme, that employee is "subject to deduction" within the meaning of §541.118(a). *See, e.g., Kinney v. District of Columbia,* 994 F.2d 6, 11 (D.C. Cir. 1993); *Abshire v. County of Kern,* 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied,* 498 U.S. 1068 (1991); *D'Camera v. District of Columbia,* 693 F. Supp. 1208, 1212 (D.D.C. 1988); *Banks v. City of North Little Rock,* 708 F. Supp. 1023, 1025 (E.D. Ark. 1988); *Hawks v. City of Newport News,* 707 F. Supp. 212, 215 (E.D. Va. 1988); *Persons v. City of Gresham,* 704 F. Supp. 191, 194 (D. Or. 1988); *Lacey v. Indiana State Police Department,* 810 F. Supp. 244 (S.D. Ind. 1992); *Pautlitz v. Naperville,* 781 F. Supp. 1368, 1371-72 (N.D. Ill. 1992). These courts have relied on the fact that the regulations specifically require that an employee be "subject to deduction" and not that an employee's pay actually be docked.

Other courts have refused to destroy an exemption merely because employees are subject to reductions in pay. *McDonnell v. City of Omaha,* 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied,* 114 S. Ct. 1188 (1994); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta,* 920 F.2d 800, 805 (11th Cir. 1991); *Harris v. District of Columbia,* 709 F. Supp. 238, 241 (D.D.C. 1989). The court in *Harris* relied, in part, on a 1986 Department of Labor letter ruling which states:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is

> claimed, including those weeks when no deductions are made.

These courts have also held that if plaintiffs can show no evidence of an employee being impermissibly docked, the employer has met its burden of proving that employees' pay was not "subject to deduction."

The Court finds the reasoning of this line of cases more persuasive. Accordingly, the Court must look to the record presented by the County in carrying its burden of proof on this issue. The Halford affidavit establishes that no lieutenant or captain has been subjected to a disciplinary suspension of less than one week,[5] but this contrasts sharply with the preceding paragraph of the affidavit which states "[t]here has been no occasion when an otherwise FLSA-exempt fire department employee has been docked pay for an absence of less than a day . . . ." This careful use of language leads to the inescapable conclusion that paramedics have been subjected to disciplinary suspensions of less than one week, and the Court so finds, based on the evidence presented by the County.[6] Accordingly, the County has failed to demonstrate that the plaintiffs' pay is not subject to reduction because of the quality or quantity of work. Even if there had been any inadvertent disciplinary suspensions, it would not result in loss of the exemption if the County properly corrected its policy through the "window of correction" allowed under 29 C.F.R. §541.118(a)(6) which states:

---

[5]Disciplinary suspension of more than one week does not affect the exemption, since the general rule enunciated in 29 C.F.R. §541.118(a) provides "that an employee need not be paid for any workweek in which he performs no work."

[6]The fact that no lieutenant or captain was ever subjected to a disciplinary suspension of less than one week does not detract from the fact that such disciplinary suspensions were County policy so long as any paramedic was so disciplined.

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts of the particular case . . . where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

There is no evidence whatsoever that the County ever reimbursed any employee for such a deduction or that the County ever took any action that would constitute a promise to comply in the future. Under the circumstances, the County has not utilized the "window of correction" under §541.118(a)(6).

Therefore, because County policy in regard to discipline for infractions other than infractions of safety rules of major significance is not permissible under the regulations, the Court finds that plaintiffs are subject to reduction based on the quality or quantity of work performed and are therefore not paid on a salary basis under the regulations.

*Professional Exemption*

The County is asserting a professional exemption for all plaintiffs who are certified as paramedics. Apparently this is an issue of first impression, as neither party has cited to a case addressing it. Plaintiffs argue that in addition to not being paid on a salary basis, that they do not have enough education to be exempt as professionals, and that they do not exercise discretion.[7] Normally a finding that plaintiffs are not paid on a salary basis would eliminate the necessity of any discusson by the Court of

---

[7]It is undisputed that all plaintiffs earn at least $250 per week.

the remaining issues concerning the professional exemption. However, the Court is well aware of the extremely complex nature of this litigation and finds it prudent to address all of the issues involved. Therefore, the Court will discuss the remaining professional exemption issues even though its finding on the salary basis issue alone assures that paramedics are not entitled to the professional exemption.

The regulations regarding professionals are set forth at 29 C.F.R. §541.300 and state "[t]he term 'professional' is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study." The regulations distinguish between learned professions and artistic professions. To be a learned profession requires "that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level." §541.301(b). Furthermore,

> The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite. In the case of registered (or certified) medical technologists, successful completion of 3 academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology . . . will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study

> has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of §541.3(a)(1) of the regulations.

29 C.F.R. §541.301(e)(1). The regulations also require that the work of a professional must involve the consistent exercise of discretion and judgment. 29 C.F.R. 541.3(b).

As the regulations do not address the status of paramedics, the parties have looked for analogies in similar jobs covered by the regulations. The County relies on the fact that nurses have traditionally been exempt as professionals. 29 C.F.R. §541.301(e)(1). Plaintiffs, on the other hand, compare paramedics to medical technologists, who are not professionals unless they have three years of study in college plus a fourth year of course work in a school of medical technology. *Id. See also, Brennan v. South Davis Community Hospital,* 538 F.2d 859 (10th Cir. 1976) (holding that chief x-ray technician was not exempt as a professional).

The parties do not appear to have a material dispute over the amount of training a paramedic needs. Plaintiffs argue that they are required to have a high school education, plus training amounting to less than one year in college. Article 8 of the Anne Arundel County Code states that a paramedic must have the following qualifications:

> Graduation from high school, successful completion of the Anne Arundel County Fire Training Academy Program, certification as a nationally registered emergency medical technician paramedic and cardiac rescue technician by the Maryland State Board of Medical Examiners, possession of a valid non-

commercial class D motor vehicle operator's license issued by the state and the ability to obtain a class A motor vehicle operator's license issued by the State.

The evidence reveals that paramedics must complete 110 hours of classroom and practical instruction to become certified as an EMT, then an additional two full-time college level semesters to become a paramedic. Paramedics also have a continuing education requirement of 72 hours of course work every two years. As for the amount of college credit required to become a nurse, defendants have submitted the affidavit of the Executive Director of the Maryland Board of Nursing to show that while many nursing programs require four years of study, Maryland has approved 14 community college programs leading to a degree in nursing, which require approximately 2 years of study.

Although paramedic training is indeed rigorous, the Court finds that paramedics do not have the necessary education to be considered professionals under the regulations. The regulations state that "an advanced academic degree is a standard (if not universal) prerequisite" to being considered a professional. 29 C.F.R. §301(e)(1). In *Dybach v. Florida Department of Corrections*, 942 F.2d 1562, 1565 (11th Cir. 1991), the Court held that a professional position "must call for a person who is in a learned profession with at least a college degree in a specialized type of learning" and further held that a generalized college degree was insufficient. *Id.*

The parties also dispute whether a paramedic's duties involve the exercise of discretion. The record establishes that they are not allowed to exercise discretion but are required to follow strict protocols and to respond to the

directions of a physician with whom the paramedic has established electronic communication.

Paramedics are not required to have any, much less an advanced, academic degree. Nor do they meet anything comparable to the medical technologist requirement of three years of college plus an additional year of course work in a school of medical technology. Whatever a comparison of the educational requirements for a nurse and a paramedic shows, a nurse generally receives a college degree in nursing. A paramedic, on the other hand, receives advanced technical training. Therefore, the Court finds that, even if plaintiffs were paid on a salary basis, they would not be exempt as professionals.

*Executive Exemption*

The County is claiming an executive exemption for all plaintiffs with the rank of EMS Captain-Operations, EMS Captain-Training Coordinator, EMS Captain-Duty Officer, and EMS Field Lieutenant. Under the short test, the County must show (1) that plaintiffs are paid on a salary basis; (2) that it is plaintiffs' primary duty to manage a recognized department or subdivision of the enterprise; and (3) that plaintiffs customarily and regularly direct the work of two or more employees. 29 C.F.R. §541.1(f). As with the professional exemption, normally the issue of the executive exemption would be rendered moot by the Court's ruling on the salary issue. It is undisputed that the plaintiffs seeking an executive exemption are paid a salary in excess of $250 per week and that they direct the work of two or more other employees. However, in the interest of throroughness, the Court will address the remainder of the executive issues.

The Fourth Circuit has recently addressed the regulations interpreting the primary duty test:

> Analysis of whether an employee's primary duty is management begins with determining which of the employee's duties involve management of a recognized department or subdivision of the employer. As a 'rule of thumb,' the employee must devote more than fifty percent of his time to these duties. 29 C.F.R. §541.103 (1992). Other pertinent factors, however, may indicate that management is the employee's primary duty. Among the factors to be considered are: (1) the relative importance of the managerial duties as compared with other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the relationship between the employee's salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.

*Shockley*, 997 F.2d at 25-26.

Plaintiffs have submitted the affidavit of John West, an EMT-Paramedic, to describe the duties of those plaintiffs for whom an executive exemption is claimed. According to the affidavit, lieutenants and captains perform some supervisory functions when on a medical call, but patient care is their primary concern and, accordingly, plaintiffs assert that they are working foremen rather than executives. In addition, plaintiffs claim that captains cannot hire, fire, or impose discipline, and they may not award bonuses or commendations; instead, they can recommend discipline. Plaintiffs argue that the fire suppression captain or lieutenant, rather than the EMS captain or lieutenant, at each station manages EMS personnel when they are not on a medical call. Because captains and lieutenants are members of the union, and grievances must go to employees outside the bargaining unit, captains and lieutenants are not involved in adjudicating grievances.

Defendants have submitted the affidavits of Stephen Halford, Deputy Chief, Administration, for the Fire Department, and Roger C. Simonds, Deputy Chief of Emergency Medical Services and Special Operations for the Fire Department, to detail the duties of those employees for whom the executive exemption is claimed.

The duties of EMS Captain-Operations include "planning, organizing, directing and administration of the EMS Division." He is in charge of all personnel under the rank of Captain-Operations. Duties include assigning, training, and supervising personnel, and handling discipline. The Captain is involved in formulation of the budget, and in inspecting and evaluating equipment and apparatus. The EMS Captain also handles contact with the public. Finally, the Captain has administrative responsibilities including maintaining payroll, personnel, and leave records. According to Simonds, a Captain's recommendations regarding promotion and firing are given significant consideration. The Operations Captain rarely responds to emergency calls, unless the call is a multiple alarm or other major incident.

The EMS Captain-Training Coordinator develops, coordinates, and delivers EMS training. His responsibilities include evaluating training techniques, supervising the EMS Training Section personnel, and establishing the direction of the training program. The Training Coordinator writes lesson plans and determines the content of any training course. He maintains training records for all personnel, supervises the use of training facilities, studies both current and new techniques and makes recommendations regarding improvements. The Training Coordinator is the liaison with any county, state, or federal agency related to training. Like the Operations Captain, the Training Coordinator rarely responds to emergency calls, unless the call involves a major incident.

The EMS Captain-Duty Officer is the commanding officer of a shift of EMS personnel. The Duty Officer coordinates training and drills, directs the work of personnel in the field, and makes recommendations on personnel matters. He also performs such administrative duties as maintaining payroll, personnel, and leave records. The Duty Officer is responsible for allocating resources for an emergency, and in controlling and directing emergency scenes. He also represents management at disciplinary hearings as directed. The Duty Officers respond to all "Rescue, Special, Multi-injury, [or] other life hazard assignments as dispatched during their assigned tour of duty."

The EMS Field Lieutenant directs operations in the field, manages personnel, including payroll and leave records, inspects supplies, apparatus, and quarters, and recommends changes in equipment and procedures. He is required to maintain operational readiness, and report on experiences in the field. He often responds to medical calls, but while on calls, he acts as supervisor, commanding other officers on the scene.

Simonds' uncontradicted testimony reveals that captains spend more than 50 percent of their time on management. Plaintiffs admit that captains generally do not go on emergency medical calls. Simonds also states that the EMS Field Lieutenants spend more than 50 percent of their time on management; however, plaintiffs have submitted an affidavit stating that Field Lieutenants spend more than 50 percent of their time on patient care. Because the testimony regarding captains is different from the testimony regarding EMS Field Lieutenants, the Court will analyze them separately.

Captains spend almost all of their time managing personnel, evaluating personnel performance, attending man-

agement meetings, performing administrative tasks in regard to management, handling sick leave, managing the distribution of equipment, and instructing subordinates. While plaintiffs are correct that under the collective bargaining agreement, captains cannot handle grievances, their recommendations regarding hiring, firing, and discipline are given significant consideration. The regulations set forth work that is typically done by management employees:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

29 C.F.R. §541.102(b). As the captains perform the vast majority of these duties more than 50 percent of the time and rarely spend time on direct patient care, under the "rule of thumb," their primary duty is management.

Even if captains did not spend 50 percent of their time on management activities, their primary duty would still be management. Applying the four factors discussed in *Shockley*, the Court finds that (1) although patient care is the ultimate objective of all EMS personnel, captains are the primary on-site managers for all other ranks of

EMS personnel; (2) captains must exercise significant managerial discretion in evaluating subordinates, managing equipment distribution, and directing employees in the field;[8] and (3) the EMS Captain-Operations is the highest ranking EMS employee at each fire station; the EMS Training Coordinator is the highest level employee in charge of training, and the EMS Captain-Duty Officer is the commanding officer of a shift of EMS personnel; accordingly, all are relatively free from supervision. As for the fourth factor, neither party has submitted any data regarding the relative pay between those for whom the executive exemption is claimed and those for whom it is not claimed. Even without the fourth factor, the Court finds that under the standard set forth in 29 C.F.R. §541.103, as enunciated more fully in *Shockley*, the primary duty of the EMS Captain is clearly management.

Plaintiffs next argue that captains do not manage a recognized department or subdivision of the fire department. They maintain that at most, EMS Captains supervise one fire station. The County's evidence reflects that each captain manages a recognized department or subdivision of the fire department, either a station or a shift of officers.

---

[8] In fact, the captains' responsibilities here are very similar to those of the officers found to be executives in *Shockley*, where the Fourth Circuit stated:

> Their responsibilities extended not only to direct supervision of their subordinates, but also to the evaluation of the subordinates and to the management of both the people and equipment assigned to their units. These responsibilities required the exercise of considerable discretion, discretion that typically is not given to a working foreman.

997 F.2d at 27.

According to the regulations, "the phrase 'a customarily recognized department or subdivision' is intended to distinguish between a mere collection of men assigned from time to time to a specific job or series of jobs and a unit with permanent status and function." 29 C.F.R. §541.104(a). A fire station is recognized as a unit with permanent status and function. *Masters*, 800 F. Supp. at 366; *Hartman*, 720 F. Supp. at 1229. Similarly, the EMS unit located at a fire station is also a unit with permanent status and function. As for the shift commanders, the Court finds that captains who manage a shift do manage a recognized department or subdivision of the fire department. The shift is the essential work force unit, and although it consists of different employees at different times, it does have a permanent status and function. Furthermore, the regulations at 29 C.F.R. §541.104(e) state that an otherwise exempt employee will not "lose the exemption merely because he draws the men under his supervision from a pool, if other factors are present which indicate that he is in charge of a recognized unit with a continuing function." Thus, the Court finds that although the captains are not paid on a salary basis, their primary duty is management and they do manage a recognized department of government. Therefore, if Captains were paid on a salary basis, they would qualify for the executive exemption.

The result is different for the EMS Field Lieutenant. The Field Lieutenant is essentially the supervisor in the field. He performs the same functions as the paramedics, although he is the person in charge. While he has some management responsibilities, patient care appears to be his primary duty. The 50 percent of the time plaintiffs claim he spends in management, or supervising others in the field, is actually better described by the concept of

the working foreman. The regulations outlining the working foreman are set forth at 29 C.F.R. §541.115(a)-(c) and state in relevant part:

> The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the "working" foreman or "working" supervisor who regularly performs "production" work or other work which is only remotely related to his supervisory activities.

29 C.F.R. §541.115(a). The regulations go on to explain that a working foreman performs the same type of work as that performed by his subordinates; however, he is also the supervisor. 29 C.F.R. §541.115(b). Even if a working foreman is responsible for maintaining time records or inspecting equipment, he should still not be considered an executive. 29 C.F.R. §541.115(c)(2)-(3). Here, the EMS Field Lieutenant works side by side and performs the same work as his subordinates. While he may be the highest ranking officer on a particular emergency call, he will still have a supervisor at the station. The EMS Field Lieutenant's job simply does not have the indicia of executive status that the Captains' jobs do; therefore the Court finds that, even if the EMS Field Lieutenant was paid on a salary basis, he would not be exempt as an executive employee.

*Administrative Exemption*

The County is claiming an administrative exemption from the requirement to pay overtime for all plaintiffs with the rank of EMS Training Lieutenant. Under the short test, Anne Arundel County must show (1) that plaintiffs are paid not less than $250 per week on a salary basis; (2) that plaintiffs' primary duty consists of "office

or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers"; and (3) that the work requires the exercise of discretion and independent judgment. 29 C.F.R. §541.2(e). The issue of the administrative exemption would normally be rendered moot by the Court's ruling that plaintiffs are not paid on a salary basis. It is undisputed that the plaintiffs seeking an administrative exemption are paid a salary in excess of $250 per week. However, in the interest of thoroughness, the Court will address the issue.

The regulations detailing employment in an administrative capacity state:

> (a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describe those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers . . . .
>
> (c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations' is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those [whose] work affects policy or whose responsibility it is to

> execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of business.

29 C.F.R. §541.205(a), (c).

The undisputed evidence establishes that the EMS Training Lieutenant develops, coordinates, implements and conducts EMS training programs. The Lieutenant also prepares lesson plans and training aids, supervises delivery of training and tests and evaluates new equipment. It is further undisputed that the EMS Training Lieutenant spends more than 50 percent of his time on administrative duties. The "rule of thumb" that an executive must spend more than 50 percent of his time on executive duties applies to administrative employees as well. 29 C.F.R. §206(b). From the evidence, the Court finds that the EMS Training Lieutenant's duties are directly related to the operation of the EMS division. The formulation and delivery of training is essential to the management of the Fire Department. While the EMS Training Lieutenant also goes out on medical calls, because he performs administrative work more than 50 percent of the time, the Court finds that his primary duty is administrative work.

The final requirement for the administrative exemption is that the work must require the exercise of independent judgment and discretion. The County has offered no evidence that the position requires the exercise of independent judgment and discretion.[9] Therefore,

---

[9]It is noted that the Simonds' affidavit states that all captains are expected to exercise independent judgment and discre-

[footnote continued]

the Court finds that the EMS Training Lieutenant does not meet the third requirement of the test for the administrative exemption and, accordingly, even if he were paid on a salary basis, he would not be exempt as an administrative employee.

*Absolute Defense*

The County maintains that it is entitled to an absolute defense, based on 29 U.S.C. §259(a) which provides:

> In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the Fair Labor Standards Act of 1938, as amended . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Here, the County cites a February 7, 1989, letter ruling from the Department of Labor to a municipal employer who sought advice concerning the application of the FLSA to employees of a fire department.[10] The em-

---

tion, but is silent as to lieutenants, including EMS Training Lieutenants.

[10]The County also cited letter rulings issued October 11, 1985, and October 21, 1987, as indicating that paramedics are

[footnote continued]

ployer had nine questions about fire department employees, several of which dealt with the issue of whether paramedics could "volunteer" to fight fires or perform other office work. The question and answer relied on by the County here states:

> Q.4. Are paramedics/firefighters employed by ____ considered to be fire protection employees so that the overtime pay exemption under section 7(k) can be applied to their employment?"
>
> A.4. Yes. Since ____ paramedics/firefighters are certified firefighters, they are considered to be engaged in fire protection activities for the purposes of section 7(k). See sections 553.210(a) and 553.-215.

Neither the question nor the answer provide any factual background to inform the County whether its situation is similar to that of the employer involved. That employer's request for a ruling is not reproduced, so the County had no way of knowing whether the paramedics employed by that employer had similar duties and responsibilities. "To establish reliance, the administrative interpretation relied upon must provide a clear answer to the particular situation." *Burnison v. Memorial Hospital, Inc.*, 820 F. Supp. 549, 558 (D. Kan. 1993) (disallowing good faith defense because administrative regulation relied upon was too general); *see also Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 927 (11th Cir. 1987) (stating that "an employer's actual reliance upon his own incorrect interpretation of a vague and general administrative guideline will not suffice"). The February 7, 1989, letter ruling does not provide a clear answer to the particular situation and, therefore, the County has not provided a com-

---

exempt if their work is integrally related to their employer's fire protection activities.

plete defense to liability under 29 U.S.C. §259. In any event, there is no evidence whatsoever that the County acted in reliance on any of the letter rulings cited.

*Good Faith and Liquidated Damages*

Because the Court has ruled that all plaintiffs are entitled to overtime compensation, it must next address the issue of liquidated damages. The parties disagree over whether defendants have put forth sufficient evidence of good faith to escape the otherwise mandatory liquidated damages. Section 216(b) of FLSA provides that an employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. §216(b). The Portal-to-Portal Act, 29 U.S.C. §260, provides a limited defense to §216:

> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had a reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in §216 of this title.

The limited defense requires the employer to show both that it acted in good faith and that it had reasonable grounds to believe it was not violating the FLSA. *See Horan v. King County, Div. of Emergency Medical Services,* 740 F. Supp. 1471, 1481 (W.D. Wash. 1990) (finding good faith and reasonable grounds); *Dybach,* 942 F.2d at 1567 (holding that employer failed to demonstrate reasonable grounds). "The good faith requirement

mandates the employer have 'an honest intention to ascertain and follow the dictates of the Act.' " *Renfro v. City of Emporia,* 948 F.2d 1529, 1540 (10th Cir. 1991), *cert. dismissed,* 503 U.S. 915 (1992) (quoting *Marshall v. Brunner,* 668 F.2d 748, 753 (3d Cir. 1982). Good faith requires some investigation of potential liability. *Horan,* 740 F. Supp. at 1481. An employer cannot "simply remain blissfully ignorant of FLSA requirements." *Burnley v. Short,* 730 F.2d 136, 140 (4th Cir. 1984).

The Court finds that the County has met its burden of showing good faith and a reasonable grounds for believing it was not violating the Fair Labor Standards Act. After the *Garcia* decision, the County evaluated the duties and responsibilities of its employees as indicated by the letters it sent to the employees advising them of the County's determination in regard to their exempt status. The position taken by the County was reasonable in light of the absence of Fourth Circuit precedent, the presence of supporting legal authority, and the historic integration of fire and emergency medical services. While this Court ultimately ruled that EMS personnel did not qualify as exempt under §7(k) of the Act, the resolution of the legal issues involved in this case is still in doubt to this very day, despite the expenditure of substantial judicial resources nationally over the last decade. The absence of precedent is also evidence of good faith. *Bond v. City of Jackson,* 727 F. Supp. 1516, 1519 (S.D. Miss. 1989), *rev'd on other grounds,* 939 F.2d 285 (5th Cir. 1991).

*Statute of Limitations*

In order to determine the appropriate statute of limitations, the Court must address the issue of whether the County's violation of the FLSA was willful. If the Coun-

ty's violation was willful, a three year statute of limitations applies; if it was not willful, a two year statute of limitations applies. 29 U.S.C. §255(a). In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Supreme Court noted that "willful" is considered synonymous with "deliberate" and "intentional." Willfulness requires that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* Negligent conduct is not willful. *Id.* In addition, good faith is a defense to willfulness, *Burgess v. Catawba County*, 805 F. Supp. 341 (W.D. N.C. 1992), "as good faith is necessarily inconsistent with knowing or reckless disregard." *Id.* at 351. *See also Dole v. Haulaway, Inc.*, 723 F. Supp. 274, 288 (D.N.J. 1989), *aff'd*, 914 F.2d 242 (3d Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). For the reasons stated in the discussion of liquidated damages, the Court finds that Baltimore County was not willful, so the proper statute of limitations is two years.

*Prejudgment Interest*

In the absence of liquidated damages, plaintiffs argue that prejudgment interest should be awarded. "In the Fourth Circuit, the prevailing standard appears to be that the decision to award prejudgment interest is a discretionary one for the trial court, which should consider the equities of the particular case." *Thomas v. County of Fairfax*, 758 F. Supp. 353, 368 (E.D. Va. 1991), *aff'd without op.*, 16 F.3d 408 (4th Cir. 1994); citing *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). The purpose of prejudgment interest is to make plaintiff whole. *See Cline v. Roadway Express, Inc.*, 689 F.2d 481 (4th Cir. 1982).

The Fourth Circuit has not ruled on whether a finding of good faith on defendant's part precludes the award of prejudgment interest. However, in this district, courts have ruled that "an employer's good faith is not a sufficient reason for denial of pre-judgment interest." *Marshall v. Board of Education,* 470 F. Supp. 517, 519 (D. Md. 1979), *aff'd* 618 F.2d 101 (4th Cir. 1980); *see also Marshall v. Gerwill, Inc.,* 495 F. Supp. 744, 755 (D. Md. 1980).

On balance, the Court finds that the equities in this case weigh in favor of the award of prejudgment interest. Primarily, the fact that the Court has upheld the County's good faith defense to liquidated damages leaves the plaintiffs without that relief to alleviate their losses from the delayed payment of wages to which they are entitled, as well as the erosion of their earnings as a result of inflation. In the companion case, *Quirk v. Baltimore County,* Civil No. B-90-2983, the Court did not award prejudgment interest because of a windfall created for the plaintiffs there caused by the unusual structure of their workweek. There is no comparable windfall in this case. Therefore, the Court finds that plaintiffs are entitled to prejudgment interest in order to be made whole for the period of time when they were unlawfully denied use of their wages. Prejudgment interest shall be awarded, as requested by plaintiffs, compounded monthly, in accordance with the rate used by the Internal Revenue Service on the underpayment of taxes.

For all of the foregoing reasons, the Court will grant in part and deny in part plaintiff's Motion for Summary

Judgment. Likewise, the Court will grant in part and deny in part defendant's Motion for Summary Judgment. A formal order will be entered in conformity with this Opinion.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

CIVIL ACTION NO.: B 90-2881

JOHN D. WEST, et al.

Plaintiffs

vs

ANNE ARUNDEL COUNTY, MARYLAND

Defendant

### FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion filed on August 18, 1995, as amended by order of October 6, 1995,

IT IS, this 18th day of January 1996, by the United States District Court for the District of Maryland,

**ORDERED:**

(1). That final judgment is hereby entered in favor of the Plaintiffs and against Anne Arundel County, in the amounts and in the names of the Plaintiffs indicated on Exhibit 1 hereto. Said amounts constitute the damages for each listed Plaintiff accrued through December 6, 1995.

(2). The Court hereby dismisses any request for injunctive relief by agreement of the parties.

(3). The judgment includes prejudgment interest as indicated in Exhibit 1 through December 6, 1995. The judgment shall begin to accrue interest pursuant to 28 U.S.C. §1961(a) as of December 7, 1995.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

---

**[The following material is a condensation of Exhibit 1 to the Final Judgment entered by the United States District Court for the District of Maryland. Because of the length and cumbersome nature of Exhibit 1, and with the concurrence of Respondents' counsel, Petitioner includes herein only the total sum of damages due to each Respondent. These sums include the total amounts due from August 1988 through December 6, 1995, and the compounded monthly prejudgment interest on those sums.]**

[EXHIBIT 1]

## ANNE ARUNDEL COUNTY FIRE DEPARTMENT
## EMS FSLA YEARLY TOTALS

| ALEXANDER, J.G. | | BAILEY, S.L. | |
|---|---|---|---|
| **Grand Total, 1988-1995** | | **Grand Total, 1988-1995** | |
| Amount Due | $31,109.96 | Amount Due | $26,751.10 |
| C.M.I.* | 6,791.70 | C.M.I.* | 6,278.45 |
| TOTAL | $37,901.66 | TOTAL | $33,029.55 |

| AMBROZEWICZ, S.P. | | BANKE, K.S. | |
|---|---|---|---|
| **Grand Total, 1988-1995** | | **Grand Total, 1988-1995** | |
| Amount Due | $2,622.20 | Amount Due | $8,716.57 |
| C.M.I.* | 1,288.50 | C.M.I.* | 619.94 |
| TOTAL | $3,910.70 | TOTAL | $9,336.51 |

| ANDERSON, M.C. | | BOND, B.L. | |
|---|---|---|---|
| **Grand Total, 1988-1995** | | **Grand Total, 1988-1995** | |
| Amount Due | $25,023.33 | Amount Due | $2,856.00 |
| C.M.I.* | 4,856.73 | C.M.I.* | 1,550.08 |
| TOTAL | $29,880.06 | TOTAL | $4,406.08 |

| ANDRESKY, M.G. | | BOSLEY, D. | |
|---|---|---|---|
| **Grand Total, 1988-1995** | | **Grand Total, 1988-1995** | |
| Amount Due | $24,585.70 | Amount Due | $30,508.11 |
| C.M.I.* | 8,101.12 | C.M.I.* | 6,830.64 |
| TOTAL | $32,686.82 | TOTAL | $37,338.75 |

| BADWAK, D.A. | | BOWEN, D.F. | |
|---|---|---|---|
| **Grand Total, 1988-1995** | | **Grand Total, 1988-1995** | |
| Amount Due | $29,535.36 | Amount Due | $26,449.03 |
| C.M.I.* | 6,971.65 | C.M.I.* | 5,759.23 |
| TOTAL | $36,507.01 | TOTAL | $32,208.26 |

*Compounded Monthly Interest

BOYER, C.W.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $2,788.35 |
| C.M.I.* | 1,432.06 |
| TOTAL | $4,220.41 |

BROCK

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $30,581.20 |
| C.M.I.* | 6,112.17 |
| TOTAL | $36,693.37 |

BROWN, D.T.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $9,139.08 |
| C.M.I.* | 4,248.84 |
| TOTAL | $13,387.92 |

BURKE, A.W., SR.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $7,052.75 |
| C.M.I.* | 2,090.47 |
| TOTAL | $9,143.22 |

BURKE, T.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $16,414.86 |
| C.M.I.* | 4,112.99 |
| TOTAL | $20,527.85 |

BUTLER, T.R.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $30,236.29 |
| C.M.I.* | 6,177.21 |
| TOTAL | $36,413.50 |

CHILDERS, G.S.

| Grant Total, 1988-1995 | |
|---|---|
| Amount Due | $24,018.18 |
| C.M.I.* | 5,001.06 |
| TOTAL | $29,019.24 |

CISSNA, K.I.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $15,117.71 |
| C.M.I.* | 3,778.54 |
| TOTAL | $18,896.25 |

CLARK, C.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $18,757.11 |
| C.M.I.* | 3,139.57 |
| TOTAL | $21,896.68 |

CLAYPOOL, K.T.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

*Compounded Monthly Interest

COLELLA, R.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $7,981.59 |
| C.M.I.* | 3,211.19 |
| TOTAL | $11,192.78 |

COLLISON, L.P.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $32,056.46 |
| C.M.I.* | 7,065.83 |
| TOTAL | $39,122.29 |

CONNOR, M.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,206.93 |
| C.M.I.* | 4,624.30 |
| TOTAL | $33,831.23 |

COOPER, W.A., JR.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $17,940.27 |
| C.M.I.* | 1,708.87 |
| TOTAL | $19,649.14 |

CORBEL, R.W.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

COVINGTON, J.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $35,061.23 |
| C.M.I.* | 7,489.95 |
| TOTAL | $42,551.18 |

COX, M.E., JR.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $32,096.12 |
| C.M.I.* | 6,752.89 |
| TOTAL | $38,849.01 |

CRAWFORD, T.S.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $5,350.31 |
| C.M.I.* | 2,439.87 |
| TOTAL | $7,790.18 |

CROW, T. II

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $19,403.65 |
| C.M.I.* | 2,625.21 |
| TOTAL | $22,028.86 |

CULLISON, R.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $14,917.96 |
| C.M.I.* | 2,943.66 |
| TOTAL | $17,861.62 |

*Compounded Monthly Interest

DAVIES, R.E., JR.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $4,914.18 |
| C.M.I.* | 232.29 |
| TOTAL | $5,146.47 |

DELALLA, M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $15,619.94 |
| C.M.I.* | 4,358.85 |
| TOTAL | $19,978.79 |

DENNETT, J.N.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $39,226.19 |
| C.M.I.* | 8,803.55 |
| TOTAL | $48,029.74 |

DEPRIEST, D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $17,927.12 |
| C.M.I.* | 2,483.03 |
| TOTAL | $20,410.15 |

DICKEY, G.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $30,438.63 |
| C.M.I.* | 7,282.68 |
| TOTAL | $37,721.31 |

DIETZ, S.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,482.70 |
| C.M.I.* | 7,039.80 |
| TOTAL | $36,522.50 |

DIETZ, G., JR.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,330.07 |
| C.M.I.* | 8,404.20 |
| TOTAL | $37,734.27 |

DUNHAM, A.Y.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $21,758.88 |
| C.M.I.* | 5,291.02 |
| TOTAL | $27,049.90 |

EDWARDS, J.H., JR.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $5,477.92 |
| C.M.I.* | 2,661.07 |
| TOTAL | $8,138.99 |

EGAN, S.E.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $20,948.34 |
| C.M.I.* | 4,275.91 |
| TOTAL | $25,224.25 |

*Compounded Monthly Interest

EICENS, M.L.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $1,985.14 |
| C.M.I.* | 1,000.28 |
| TOTAL | $2,985.42 |

EISENHARDT, W.J.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $35,314.24 |
| C.M.I.* | 8,226.73 |
| TOTAL | $43,540.97 |

ESKER, E.A.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

ESTEPP, K.M.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $22,235.05 |
| C.M.I.* | 5,144.39 |
| TOTAL | $27,379.44 |

FEILINGER, S.S.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $9,595.51 |
| C.M.I.* | 2,892.30 |
| TOTAL | $12,487.81 |

FINK, R., JR.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $27,378.35 |
| C.M.I.* | 7,041.89 |
| TOTAL | $34,420.24 |

FISHEL, D.G., JR.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $13,629.83 |
| C.M.I.* | 3,766.67 |
| TOTAL | $17,396.50 |

FORD, W.A., JR.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $23,545.33 |
| C.M.I.* | 5,777.79 |
| TOTAL | $29,323.12 |

FRITZ, B.A.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $16,045.21 |
| C.M.I.* | 1,790.26 |
| TOTAL | $17,835.47 |

FRYE, ST. K.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $14,517.91 |
| C.M.I.* | 1,084.79 |
| TOTAL | $15,602.70 |

*Compounded Monthly Interest

GERO, T.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $20,001.38 |
| C.M.I.* | 4,060.89 |
| TOTAL | $24,062.27 |

GESLOIS, D.J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

GLIME, J.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $31,869.43 |
| C.M.I.* | 6,265.15 |
| TOTAL | $38,134.58 |

GOETZ, J.E.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $20,682.80 |
| C.M.I.* | 4,329.57 |
| TOTAL | $25,012.37 |

GORMLEY, J.P.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $4,954.50 |
| C.M.I.* | 2,496.68 |
| TOTAL | $7,451.18 |

GREENE, J.C.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $30,877.62 |
| C.M.I.* | 7,148.40 |
| TOTAL | $38,026.02 |

GROTE, K.D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,354.25 |
| C.M.I.* | 5,280.86 |
| TOTAL | $34,635.11 |

HARRIS, R.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $25,259.64 |
| C.M.I.* | 6,705.00 |
| TOTAL | $31,964.64 |

HARSH, R.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $3,810.31 |
| C.M.I.* | 1,781.09 |
| TOTAL | $5,591.40 |

HARSH, J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $7,200.29 |
| C.M.I.* | 3,359.04 |
| TOTAL | $10,559.33 |

*Compounded Monthly Interest

HENRY, S.M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $8,150.34 |
| C.M.I.* | 3,418.01 |
| TOTAL | $11,568.35 |

HENRY, M.P.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $27,044.30 |
| C.M.I.* | 6,413.86 |
| TOTAL | $33,458.16 |

HERZ, M.W.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $4,541.52 |
| C.M.I.* | 2,042.32 |
| TOTAL | $6,583.84 |

HOUSAND, L.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $25,150.40 |
| C.M.I.* | 4,333.01 |
| TOTAL | $29,483.41 |

HOWE, B.J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $12,928.69 |
| C.M.I.* | 867.74 |
| TOTAL | $13,796.43 |

HUBER, J.M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

HUFFMAN, M.C.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $10,969.20 |
| C.M.I.* | 711.42 |
| TOTAL | $11,680.62 |

ISENNOCK, W.W.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $28,742.24 |
| C.M.I.* | 5,927.62 |
| TOTAL | $34,669.86 |

JARZYNSKI, D.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,812.96 |
| C.M.I.* | 6,952.15 |
| TOTAL | $36,765.11 |

JETT, G.E.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $4,700.76 |
| C.M.I.* | 2,278.79 |
| TOTAL | $6,979.55 |

*Compounded Monthly Interest

JOHNSON, R.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,164.58 |
| C.M.I.* | $5,502.10 |
| TOTAL | $34,666.68 |

JONES, S.E.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $17,780.38 |
| C.M.I.* | 2,621.56 |
| TOTAL | $20,401.94 |

JORDAN, J.M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $12,050.18 |
| C.M.I.* | 795.31 |
| TOTAL | $12,845.49 |

JOY, R.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $34,730.21 |
| C.M.I.* | 6,952.79 |
| TOTAL | $41,683.00 |

KIDWELL, J.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $13,807.68 |
| C.M.I.* | $4,856.65 |
| TOTAL | $18,664.33 |

KLINGER, D.R.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $24,028.89 |
| C.M.I.* | 3,298.63 |
| TOTAL | $27,327.52 |

KOOSER, C.C.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $4,158.18 |
| C.M.I.* | 993.40 |
| TOTAL | $5,150.58 |

KRUGER, J.D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $18,660.66 |
| C.M.I.* | 4,695.99 |
| TOTAL | $23,356.65 |

LEFLER, S.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $4,721.01 |
| C.M.I.* | 2,423.56 |
| TOTAL | $7,144.57 |

LEFLER, K.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,948.54 |
| C.M.I.* | 6,918.63 |
| TOTAL | $36,867.17 |

*Compounded Monthly Interest

LINGREN, R.J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $15,109.97 |
| C.M.I.* | 1,433.87 |
| TOTAL | $16,543.84 |

MERSON, W.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $18,035.43 |
| C.M.I.* | 2,906.65 |
| TOTAL | $20,942.08 |

MARSHALL, D.P.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $21,315.42 |
| C.M.I.* | 3,570.99 |
| TOTAL | $24,886.41 |

MIKULES, T.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $38,281.75 |
| C.M.I.* | 8,280.46 |
| TOTAL | $46,562.21 |

MARSIGLIA, M.J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $23,320.00 |
| C.M.I.* | 5,191.37 |
| TOTAL | $28,511.37 |

MOORE, M.S.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $24,624.76 |
| C.M.I.* | 6,166.65 |
| TOTAL | $30,791.41 |

MCANALLEN, J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $2,624.26 |
| C.M.I.* | 1,343.15 |
| TOTAL | $3,967.41 |

NOVAK, G.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $25,570.56 |
| C.M.I.* | 4,386.16 |
| TOTAL | $29,956.72 |

MEAD, R.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

O'BRIEN, R.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $0.00 |
| C.M.I.* | 0.00 |
| TOTAL | $0.00 |

*Compounded Monthly Interest

O'CONNELL, M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $8,113.78 |
| C.M.I.* | 3,907.17 |
| TOTAL | $12,020.95 |

ORYE, J.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $1,989.40 |
| C.M.I.* | 619.64 |
| TOTAL | $2,609.04 |

PARDOE, K.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $5,988.85 |
| C.M.I.* | 2,864.13 |
| TOTAL | $8,852.98 |

PEZZA, T.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $24,281.37 |
| C.M.I.* | 4,338.30 |
| TOTAL | $28,619.67 |

PFEFFER, G.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $1,192.35 |
| C.M.I.* | 421.64 |
| TOTAL | $1,613.99 |

PHILLIPS, W.H.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $8,015.12 |
| C.M.I.* | 1,995.01 |
| TOTAL | $10,010.13 |

POPE, N.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $25,353,95 |
| C.M.I.* | 4,426.37 |
| TOTAL | $29,780.32 |

PRASCHAK, M.S.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,548.37 |
| C.M.I.* | $6,095.90 |
| TOTAL | $35,644.27 |

PRENDERGAST, P.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $10,014.53 |
| C.M.I.* | 4,337.58 |
| TOTAL | $14,352.11 |

PUGLIESE, A.J.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $3,592.70 |
| C.M.I.* | 1,863.20 |
| TOTAL | $5,455.90 |

*Compounded Monthly Interest

RABINOWITZ, C.A.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $10,929.30 |
| C.M.I.* | 3,798.19 |
| TOTAL | $14,727.49 |

RAY, C.E.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $25,233.80 |
| C.M.I.* | 4,359.55 |
| TOTAL | $29,593.35 |

RITCHIE, R.D.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $11,107.07 |
| C.M.I.* | 752.81 |
| TOTAL | $11,859.88 |

RODRIGUEZ, D.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $21,730.00 |
| C.M.I.* | 3,249.99 |
| TOTAL | $24,979.99 |

ROSS, E.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $8,242.21 |
| C.M.I.* | 2,173.05 |
| TOTAL | $10,415.26 |

ROSTEK, J.C.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $22,875.64 |
| C.M.I.* | 4,378.76 |
| TOTAL | $27,254.40 |

SCHMIDT, R.J.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $12,180.29 |
| C.M.I.* | 4,519.16 |
| TOTAL | $16,699.45 |

SCHNEIDER, K.S.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $16,512.68 |
| C.M.I.* | 2,681.45 |
| TOTAL | $19,194.13 |

SCHUELER, D.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $13,797.74 |
| C.M.I.* | 1,467.40 |
| TOTAL | $15,265.14 |

SHANK, H.W.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $31,323.38 |
| C.M.I.* | 6,822.97 |
| TOTAL | $38,146.35 |

*Compounded Monthly Interest

SLEDGESKI, C.W.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $8,583.32 |
| C.M.I.* | 3,726.28 |
| TOTAL | $12,309.60 |

SMITH, G.L.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $12,929.61 |
| C.M.I.* | 4,660.97 |
| TOTAL | $17,590.58 |

SMITH, M.A.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | 856.05 |
| C.M.I.* | 293.90 |
| TOTAL | $1,149.95 |

SPIES, R.S.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $25,599.74 |
| C.M.I.* | 5,201.68 |
| TOTAL | $30,801.42 |

SQUILLACI, J.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $8,785.13 |
| C.M.I.* | 643.70 |
| TOTAL | $9,428.83 |

STAG, T.A.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $6,653.33 |
| C.M.I.* | 2,074.13 |
| TOTAL | $8,727.46 |

STALEY, P.G.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $18,218.63 |
| C.M.I.* | 5,999.30 |
| TOTAL | $24,217.93 |

STAMM, F.R.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $18,446.57 |
| C.M.I.* | 6,815.25 |
| TOTAL | $25,261.82 |

STARR, L.E.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $16,617.37 |
| C.M.I.* | 5,357.57 |
| TOTAL | $21,974.94 |

STERLING, D.M.

**Grand Total, 1988-1995**

| | |
|---|---|
| Amount Due | $25,096.19 |
| C.M.I.* | 8,581.66 |
| TOTAL | $33,677.85 |

*Compounded Monthly Interest

SWAIN, M.L.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $15,700.10 |
| C.M.I.* | 3,634,70 |
| TOTAL | $19,334.80 |

SWINDLE, K.D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $33,616.25 |
| C.M.I.* | 7,820.87 |
| TOTAL | $41,437.12 |

THOMPSON, S.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $33,027.96 |
| C.M.I.* | 7,599.14 |
| TOTAL | $40,627.10 |

TUCKER, T.A.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $15,312.30 |
| C.M.I.* | 4,562.62 |
| TOTAL | $19,874.92 |

VACCARO, R.T.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $24,704.19 |
| C.M.I.* | 4,356.56 |
| TOTAL | $29,060.75 |

VALDERAS, R.M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $29,258.10 |
| C.M.I.* | 6,855.74 |
| TOTAL | $36,113.84 |

WALLACE, M.D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $8,526.48 |
| C.M.I.* | 2,967.56 |
| TOTAL | $11,494.04 |

WARD, W.M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $31,451.04 |
| C.M.I.* | 7,053.12 |
| TOTAL | $38,504.16 |

WEIGEL, D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $10,162.25 |
| C.M.I.* | 643.88 |
| TOTAL | $10,806.13 |

WELLMAN, J.B.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $2,521.87 |
| C.M.I.* | 1,226.88 |
| TOTAL | $3,748.75 |

*Compounded Monthly Interest

WEST, J.D.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $32,231.05 |
| C.M.I.* | 6,923,16 |
| TOTAL | $39,154.21 |

WILLIAMS, D.K.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $23,871.32 |
| C.M.I.* | 5,571.04 |
| TOTAL | $29,442.36 |

WILDT, K.E.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $5,656.82 |
| C.M.I.* | 2,157.94 |
| TOTAL | $7,814.76 |

YETTER, C.E.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $14,117.69 |
| C.M.I.* | 1,718.48 |
| TOTAL | $15,836.17 |

WILHELM, W.M.

| Grand Total, 1988-1995 | |
|---|---|
| Amount Due | $35,632.03 |
| C.M.I.* | 8,187.53 |
| TOTAL | $43,819.56 |

**GRAND TOTALS:**

| | |
|---|---|
| Amount Due | $2,369,227.96 |
| Compounded Monthly Interest | 537,975.67 |
| TOTAL | $2,907,203.63 |

*Compounded Monthly Interest

## APPENDIX D

PUBLISHED

[137 F.3d 752 (4th Cir. 1998)]

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 96-1251

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR; MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; SHARON M. HENRY; MICHAEZ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARYZNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE

L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR.; CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE,

*Plaintiffs-Appellees,*

UNITED STATES OF AMERICA,

*Intervenor,*

*v.*

ANNE ARUNDEL COUNTY, MARYLAND,

*Defendant-Appellant,*

CITY OF BALTIMORE, MARYLAND,

*Amicus Curiae.*

---

No. 96-1280

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR; MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; SHARON M. HENRY; MICHAEZ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARYZNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL

STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR., CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE,

*Plaintiffs-Appellees,*

UNITED STATES OF AMERICA,

*Intervenor,*

*v.*

ANNE ARUNDEL COUNTY, MARYLAND,

*Defendant-Appellant,*

CITY OF BALTIMORE, MARYLAND,

*Amicus Curiae.*

---

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., Senior District Judge.
(CA-90-2281-B)

Argued: December 1, 1997

Decided: February 18, 1998

Before WILKINSON, Chief Judge, HAMILTON, Circuit Judge, and NORTON, United States District Judge for the District of South Carolina, sitting by designation.

---

Affirmed in part and reversed in part by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Hamilton and Judge Norton joined.

---

## COUNSEL

**ARGUED:** Gail Thuman Watson, Assistant County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellant. John D. Maddox, ARTER & HADDEN, Washington, D.C., for Amicus Curiae. Francis Joseph Collins, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland, for Appellees. Steph-

anie Robin Marcus, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. **ON BRIEF**: David A. Plymyer, Deputy County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellant. Thomas H. Odom, Terri L. Bowman, ARTER & HADDEN, Washington, D.C.; Otho M. Thompson, City Solicitor, James S. Ruckle, Jr., Associate City Solicitor, BALTIMORE CITY LAW DEPARTMENT, Baltimore, Maryland, for Amicus Curiae. Joel A. Smith, Andrew H. Kahn, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland; Laurence Gold, Washington, D.C., for Appellees. Frank W. Hunger, Assistant Attorney General, Lynne Ann Battaglia, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor.

## OPINION

Wilkinson, Chief Judge:

Following the Supreme Court's decision in *Printz v. United States*, 117 S. Ct. 2365 (1997), this court requested supplemental briefing on the following question: "In light of the Supreme Court's decision in *Printz v. United States*, 65 U.S.L.W. 4731 (June 27, 1997), whether the Fair Labor Standards Act may be constitutionally applied to the salary determinations at issue in this case." The parties briefed and argued the constitutionality of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201 *et seq.*, as applied to state and local governments. Anne Arundel County argued vigorously that the present Supreme Court would hold the FLSA violative of the Tenth Amendment as it applies to state and local government employees. Our task, however, is not

to predict what the Supreme Court might do but rather to follow what it has done. In light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), we must uphold the constitutionality of applying the FLSA to Anne Arundel County in this case.

With respect to the merits of plaintiffs' FLSA claims, we affirm in part and reverse in part the judgment of the district court.

I.

John West and his fellow plaintiffs are current or former employees of the Anne Arundel County Fire Department. They are known as Emergency Medical Technicians, or EMTs. Between 1987 and 1995, each was assigned to the Fire Department's Emergency Medical Services (EMS) Division in the job classification of Firefighter/Emergency Medical Technician-Ambulance, Firefighter/Cardiac Rescue Technician, or Firefighter/Emergency Medical Technician-Paramedic.

Like all County firefighters, the EMTs completed a twenty-one-week Fire Academy, which included training in all aspects of the Department's emergency service work – firefighting, emergency medical services, rescue, and hazardous materials operations. Once they were assigned to the EMS Division, plaintiffs worked the same shift schedule and were integrated into the same command structure as other firefighters. When responding to a call, however, EMTs were generally prohibited from active participation in fire suppression in order to keep clean for their medical duties.

The employment relationship between the Fire Department and all firefighters, including EMS personnel, was governed by the same union contract. Firefighters and

EMTs were compensated for overtime hours according to the partial exemption for fire protection and law enforcement employees in section 7(k) of the FLSA, 29 U.S.C. §207(k), rather than the general forty-hour standard set forth in section 7(a) of the FLSA, 29 U.S.C. §207(a).

Plaintiff EMTs filed suit challenging their classification as fire protection employees and seeking lost overtime pay, liquidated damages, prejudgment interest, and attorney's fees. The district court granted plaintiffs summary judgment, finding that they did not fall under the section 7(k) exemption. The court rejected the County's argument that plaintiffs who had been Captains, Field Lieutenants, Training Lieutenants, or Paramedics were exempt from overtime requirements as "bona fide executive, administrative, or professional" personnel. *See* 29 U.S.C. §213(a)(1). And the court denied the County's defense of good faith under 29 U.S.C. §259(a). Plaintiffs were awarded prejudgment interest but no liquidated damages, and the court applied a two-year statute of limitations to their claims. Both parties appeal.[1]

II.

A.

In this case we are asked to apply the FLSA to a subdivision of state government. For some years following the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (subjecting a local government to the FLSA), such application was constitutionally uncontroverted. In a recent line of cases culminating in *Printz v. United States*, 117 S. Ct. 2365 (1997), however, the Supreme Court has

[1]The County does not appeal the district court's decision with respect to Paramedics.

imposed limits, either through the Commerce Clause or the Tenth and Eleventh Amendments, on the power of Congress to enact legislation that affects state and local governments. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (Tenth Amendment) (*New York II*); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Eleventh Amendment). In view of the strong commitment to state sovereignty evidenced in this series of cases, this court ordered supplemental briefing and heard argument from the parties on the question whether the FLSA could constitutionally be applied to determine wages and working conditions for critical components of the state and local workforce.

The County, joined by amicus City of Baltimore, advances three main arguments against applying the FLSA to state governmental entities.[2] First, the County contends that state governments should be able to set the wages and working conditions of their own employees. Even if one does not accept this broad and bright-line formulation, however, the County reads *Printz* to prohibit federal regulation of any activity of state government that can be said to be a core governmental function. Any definition of core governmental function, argues the County, would, at a minimum, include the emergency public safety services provided by the Fire Department.

---

[2]Hereafter we will use the word "state" to include local governments. For purposes of determining whether a governmental entity is protected by constitutional guarantees of federalism, including the Tenth Amendment, the law does not distinguish between states and their political subdivisions. That "distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity." *Printz*, 117 S.Ct. at 2382 n.15 (citation omitted).

According to the County, *Printz* breathed new life into the principle of federalism underlying the Tenth Amendment and revived the "traditional governmental function" analysis employed before *Garcia* in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). The County thus interprets *Printz* to invalidate congressional enactments like the FLSA that "compromise the structural framework of dual sovereignty" by regulating a quintessential government function such as firefighting, no matter what form the law takes – whether it explicitly "direct[s] the functioning" of state governments or is a "law of general applicability" the incidental application of which "excessively interfere[s] with the functioning of state governments." *See Printz*, 117 S. Ct. at 2383.

The County also equates the 1974 FLSA Amendments with the Brady Handgun Violence Prevention Act invalidated in *Printz*. Both laws are said impermissibly to "commandeer" or "conscript" state government processes by forcing them to conform to and serve a federal mandate. *See, e.g., id.* at 2381; *New York II*, 505 U.S. at 175, 178. The relevant provisions of the 1974 Amendments targeted only state governmental entities; thus, says the County, the Amendments constitute direct regulation of states as states. The County further contends that the financial burden of compliance with the FLSA would require a wholesale restructuring and/or reduction of the services provided by the Fire Department. The arcane and impenetrable nature of FLSA regulations, says the County, only adds to the level of federal intrusiveness. By thus dictating the organization and operation of a local fire department, the County claims the FLSA effectively directs the functioning of this governmental unit and transgresses *Printz*'s ban on federal conscription of state governments.

Finally, the County deems the FLSA unconstitutional even if it is seen as a law of general applicability that regulates states only incidentally. According to the County's interpretation of *Printz*, the constitutionality of such laws turns on a "balancing test" like that in *Fry v. United States*, 421 U.S. 542 (1975), *National League of Cities*, 426 U.S. 833 (1976), and *South Carolina v. Baker*, 485 U.S. 505 (1988), which weighs the seriousness of the problem addressed by the federal law against the effect on state sovereignty of compliance with it. The County concludes that the FLSA is unconstitutional as applied to the Fire Department because it fails this test. According to the County, the FLSA aims to remedy substandard labor conditions and encourage the spread of employment. The County sees these objectives as meaningless in the context of the Fire Department, where employees are adequately represented by a union and the amount of employment is controlled by a "tax-cap" limit on supply and unpredictable demand that is indexed to the rate of accidents. Weighed against the uncertain or negligible benefit of regulation, the County claims that the serious impact of FLSA compliance on the structure and size of the Fire Department constitutes excessive interference with state sovereignty.

Plaintiffs, joined by the United States as intervenor, insist that the FLSA may constitutionally be applied in this case. They deride the County's proposed "traditional governmental function" analysis as unworkable. The Supreme Court unanimously abandoned a similar "untenable" standard in the area of intergovernmental tax immunity. *See New York v. United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 590-96 (Douglas,

J., dissenting, joined by Black, J.) (*New York I*). And plaintiffs point out that as recently as last term the Court refused to grant immunity from suit under 42 U.S.C. §1983 for private sector employees performing a "governmental" function on grounds that "a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities." *Richardson v. McKnight*, 117 S. Ct. 2100, 2106 (1997). Thus, even in light of *Printz*, plaintiffs see no reason to expect the Supreme Court to depart from its conclusion in *Garcia* "that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism." 469 U.S. at 531.

Plaintiffs also dispute the County's attempt to locate the 1974 FLSA Amendments in the line of Tenth Amendment cases concerning federal laws that commandeer state government. Plaintiffs argue that the 1974 Amendments simply do not fit the category of conscriptive legislation. First, they point out that cases in this line of authority have considered federal laws that impress state officials to enact or administer a federally-conceived regulatory program. *See, e.g., Printz*, 117 S. Ct. at 2380-84 (invalidating background check obligation imposed by Brady Act on state law enforcement personnel because it impermissibly "dragooned" them "into administering federal law") (citation omitted); *New York II*, 505 U.S. at 162 (invalidating congressional attempt "to require the States to govern according to Congress' instructions"). Plaintiffs maintain that the FLSA does not come close to having this effect. They deny that the FLSA actually regulates the structure or functioning of the Fire Department, insisting that the FLSA allows the Department to reach whatever salary and scheduling arrangement for

EMTs and firefighters it wants, within broad statutory parameters. Plaintiffs thus conclude that, because the County remains free to structure the provision of fire and rescue services however it sees fit, the County government has not in fact been "commandeered."

Rather, according to plaintiffs, the 1974 Amendments are part of a conceptually distinct category: laws of general applicability that incidentally apply to state governments. Plaintiffs insist that *Printz* had no effect on such general regulation, noting that in *Printz*, as it had in *New York II*, the Supreme Court consciously maintained the long-standing distinction between general legislation that incidentally affects states and targeted legislation that conscripts the processes of state government. *Printz*, 117 S. Ct. at 2383; *New York II*, 505 U.S. at 160-61 ("[T]his is not a case in which Congress has subjected a State to the same legislation applicable to private parties. This litigation instead concerns the circumstances under which Congress may use the States as implements of regulation, that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.") (citations omitted). Plaintiffs point to *Garcia* as the controlling authority in the former line of cases, where the Supreme Court explicitly approved applying the FLSA to a governmental entity despite federalism objections. *See* 469 U.S. at 555-56. Further, plaintiffs contend that, to the extent *Printz* mandates a balancing test to determine the constitutionality of applying such general regulation to states, *Garcia* has already struck the balance with respect to the FLSA and deemed it a permissible regulation of state employment.

B.

The parties have thus ably joined issue on the critical constitutional issue in this case. Their respective conten-

tions demonstrate two things: (1) that the Court in *Printz* has generally stressed the importance of the Tenth Amendment in our constitutional system; and (2) that neither *Printz* nor any other Supreme Court case has specifically overruled *Garcia*. In the end, therefore, we conclude both that *Garcia* controls the disposition of that issue and that any decision to revisit *Garcia* is not ours to make. In a case decided the same term as *Printz*, the Supreme Court did not move to reconsider *Garcia* and enforced the FLSA against a local government agency without addressing the constitutional question. *Auer v. Robbins*, 117 S. Ct. 905, 909 (1997). Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent. *E.g., Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997). The Supreme Court's direction has been crystal clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). That apparently is the situation here: *Garcia* is specifically on point; *Printz*'s contrary intimations are only generally instructive. We thus conclude on the authority of *Garcia* that the application of the FLSA to the Anne Arundel County Fire Department presents no constitutional defect.

III.

We next turn to the merits of the parties' FLSA claims. Section 7(a) of the FLSA mandates overtime compensation at a rate of one and one-half times the regular hourly rate for every hour worked in excess of forty per workweek. 29 U.S.C. §207(a). Section 7(k) outlines a special overtime system for employees of public agencies engaged

in fire protection or law enforcement activities. As construed by the Department of Labor, this section mandates that time-and-a-half be paid to fire protection workers for every hour worked in excess of fifty-three per workweek. 29 U.S.C. §207(k); 29 C.F.R. §553.230. The County claims that plaintiffs engage in "fire protection activities" and thus fit within the section 7(k) exemption from the FLSA's overtime requirements. Like the district court, we disagree.

The County relies on the regulatory definition of "fire protection activities," which "include[s] rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. §553.210. The County asserts that plaintiffs are such "an integral part" of the Department's fire protection activities: EMTs function together with firefighters in a unified command structure, receive fire academy training, share union representation with firefighters, work at the same facilities and towards a common goal with firefighters, and operate under a system of coresponding to all calls the Department receives.

The County, however, has not shown that EMTs' activities integrally relate to the Fire Department's fire protection activities. Further, we agree with plaintiffs that 29 C.F.R. §553.212(a) directs the conclusion that EMTs are not employees engaged in "fire protection activities." This regulation plainly imposes an across-the-board limitation on the amount of non-fire-fighting work that employees may perform and still qualify as fire protection employees under 29 U.S.C. §207(k):

> Employees engaged in fire protection or law enforcement activities as described in §§553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in

> conjunction with their fire protection or law enforcement activities. . . . The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. *A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.*

29 C.F.R. §553.212 (emphasis added). Plaintiffs do not qualify as fire protection employees because they exceed this twenty percent limit. EMTs perform mostly medical services and work related to medical services. As such, they are medical personnel rather than firefighters. In an affidavit, the named plaintiff, John West, indicates that his job typically consists of

> preparing for medical emergencies, traveling to medical emergencies, stocking the ambulance or emergency medical vehicle, administering first aid and other medical care in emergency medical situations, transporting patients to hospitals, cleaning and maintaining the ambulance and station, attending training sessions, studying emergency medical procedures and waiting to be called on emergency medical calls.

The record shows that, during the period at issue in this lawsuit, at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all. Medical services which are not rendered at the scene of any fire do not qualify as exempt activities. *Id.* (exempt work must be "performed as an incident to or in conjunction with" fire protection activities); *see also id.* §553.210(a)(4) (defining fire protection activities as those activities "directly con-

cerned" with "the prevention, control or extinguishment of fires"). Moreover, when the Fire Department did respond to a fire call, EMTs were prohibited by standard operating procedure from engaging in fire suppression activities. In light of this evidence that plaintiff EMTs generally did not – and could not – fight fires, it cannot be said that "fire protection activities" comprised more than eighty percent of their work. Thus, we find that the County violated the FLSA when it subjected plaintiffs to the special overtime standard for fire protection employees.

IV.

Next we turn to the County's claim that plaintiffs ranked as Captains or Lieutenants are exempt from overtime as employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). FLSA section 13(a) indicates that the statute's overtime provisions "shall not apply" to such employees. *Id.* §213(a). It is clear that all plaintiffs were paid more than $250.00 each week, so we apply the regulatory "short test" to the County's submissions. *See* 29 C.F.R. §§541.1 & 541.2.

A.

First, the County claims that plaintiffs employed in the positions of EMS Captain-Operations, EMS Captain-Training Coordinator, and EMS Captain-Duty Officer ("Captains") are not entitled to overtime pay because they qualify as executives.[3] In order to fit this exemp-

[3]Throughout this litigation Captains have been treated as a group, and neither party attempts to draw any meaningful distinction between them with respect to their duties or salary status.

tion, an employee must be "compensated on a salary basis," and most of his duties must involve management. *Id.* §541.1(f). We agree with the County that Captains satisfy both the salary test and the duties test for the executive exemption.

An individual is employed on a salary basis "if under his employment agreement he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* §541.118(a). Plaintiffs receive a minimum predetermined amount every two weeks, plus additional compensation in the form of overtime. They are paid for 50 hours of work each week, even if they only work 48 hours. Plaintiffs thus appear to be employed on a salary basis. Additional compensation does not alter the status of salaried employees, *id.* §541.118(b), so the receipt of overtime does not defeat the salary basis of plaintiffs' employment. *York v. City of Wichita Falls,* 944 F.2d 236, 242 (5th Cir. 1991); *Hartman v. Arlington Cty.,* 720 F. Supp. 1227 (E.D. Va 1989), *aff'd on reasoning of lower court,* 903 F.2d 290 (4th Cir. 1990).

Plaintiffs claim that Captains are "subject to" two reductions in pay that defeat salary basis: reductions for minor disciplinary infractions and reductions for partial-day absences. FLSA regulations provide that "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status," implying that reductions in pay for lesser disciplinary violations do defeat the salary basis of employment. 29 C.F.R. §541.118(a)(5); *accord Auer,* 117 S. Ct. at 909; *Shockley v. City of Newport News,* 997 F.2d 18, 24-25 (4th Cir. 1993). And under regula-

tions in effect during the period in question in this case, reductions in pay for absences of less than a day would defeat salary basis.[4] *See* 57 Fed. Reg. 37,666 (1992); *Shockley*, 997 F.2d at 22. Plaintiffs aver that all Fire Department employees are subject to these impermissible deductions and conclude from this assertion that all plaintiffs, including Captains, are not salaried. The County responds with the testimony of Stephen Halford, Deputy Chief of Administration for the Fire Department, that there has been no occasion when a Captain has actually suffered such a deduction.

At the time of trial, the courts of appeals were divided on the question of whether merely being subject to impermissible reductions, even if a deduction is never exacted, defeats salary basis. *Compare, e.g., Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir 1993) (holding that if an employee's pay can theoretically be docked, that employee is "subject to deduction" within the meaning of 29 C.F.R. §541.118(a) and thus is not salaried), *with, e.g., Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (holding that employee loses salaried status only if their pay is actually docked). However, during the pendency of this appeal, the Supreme Court resolved this circuit split. *See Auer*, 117 S. Ct. at 910-11. The Supreme Court interpreted the FLSA regulations to mean that employees lose salaried status if they "are

---

[4] We note that "[t]he Department of Labor created an exception to this principle on September 6, 1991, when it promulgated 29 C.F.R. §541.5d. . . . Therefore, to the extend that [County] policy in fact required such reductions, the policy only affects whether [Captains] were paid on a salary basis prior to September 6, 1991." *Shockley*, 997 F.2d at 22 (citations and footnote omitted).

covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.' " *Id.* at 911 (quoting Secretary of Labor's brief as amicus curiae). "That standard is met . . . if there is either [1] an actual practice of making such deductions or [2] an employment policy that creates a 'significant likelihood' of such deductions." *Id.*

Because "an appellate court must apply the law in effect at the time it renders its decision," *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281 (1969), we use the standard adopted in *Auer*. In light of the evidence that no Captain has ever suffered a deduction in pay for either a minor disciplinary infraction or a partial-day absence, the first condition is not satisfied – the Fire Department clearly has no "actual practice" of such deductions. And the Supreme Court's reasoning in *Auer* shows that the second condition is also not met here. Because the disciplinary policy at issue in *Auer* governed all employees alike, salaried and nonsalaried, it did not "effectively communicate" a "significant likelihood" of disciplinary pay deductions for salaried employees. 117 S. Ct. at 911. Likewise in the instant case, plaintiffs themselves assert that Lieutenants and Captains "are subject to the same disciplinary rules and regulations and are subject to the same potential disciplinary measures" as other employees. Thus, as in *Auer*, this general policy does not defeat salary basis. *Id.*; *accord Stanley v. City of Tracy*, 120 F.3d 179, 184 (9th Cir. 1997); *Balgowan v. New Jersey*, 115 F.3d 214, 219 (3d Cir. 1997).

FLSA regulations also require that the "primary duty" of an executive (1) consist of "the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof," and (2) "includes the customary and regular direc-

tion of the work of two or more other employees therein." 29 C.F.R. §541.1(f). We agree with the district court that Captains meet these requirements. "As a 'rule of thumb,' " for tasks to constitute an employee's primary duty, "the employee must devote more than fifty percent of his time to these duties." *Shockley*, 997 F.2d at 26; *see also* 29 C.F.R. §§541.103 & 541.206(b). The district court's conclusion that "Captains spend almost all of their time managing personnel, evaluating personnel performance, attending management meetings, performing administrative tasks in regard to management, handling sick leave, managing the distribution of equipment, and instructing subordinates" is amply supported by the descriptions of the Captains' positions in the record. And in performing their jobs, Captains customarily supervise either one fire station or an entire shift of officers. A station or a shift constitutes a recognized department or subdivision of the Fire Department and is comprised of many more than the regulatory minimum of "two or more other employees." Thus, we find that all Captains qualify for the executive exemption from overtime pay.

B.

The County further claims that Field Lieutenants are exempt from overtime as executives. We agree. All employees of the Fire Department are subject to the same generally applicable policy of deductions, and there is no evidence that any impermissible deductions have actually been exacted from any Lieutenant's salary. Thus, applying the reasoning of *Auer*, we conclude that, like Captains, Field Lieutenants are paid on a salary basis.

Turning to the duties component of the executive exemption, we hold that the primary duty of Field Lieu-

tenants is management of a recognized department or subdivision of the Fire Department and that they customarily and regularly direct the work of two or more employees. *See* 29 C.F.R. §541.1(f). Field Lieutenants manage and direct the operations of all shifts of an EMS company, which, as noted above, constitute recognized subdivisions of the Fire Department. Field Lieutenants devote the majority of their time to management: they coordinate and implement EMS training programs at the company level; maintain company payroll and personnel leave records; enforce departmental rules and regulations; ensure operational readiness through supervision and inspection of personnel, equipment, and quarters; evaluate and test subordinates; and report and make recommendations on equipment and procedures. During the course of these activities, they supervise the work of two or more employees.

This evidence of Field Lieutenants' management responsibilities notwithstanding, the district court concluded that Field Lieutenants are best classified as "working foremen" under 29 C.F.R. §541.115, rather than exempt executives, because they supervise EMS operations in the field. We disagree. Here, as in *Shockley*, the Field Lieutenants' responsibilities extend beyond mere field supervision "to the evaluation of the subordinates and to the management of both the people and equipment assigned to their units." 997 F.2d at 27. Under *Shockley*, therefore, the working foreman concept does not apply.

C.

The County seeks the benefit of the exemption for administrative employees for plaintiffs employed as EMS Training Lieutenants. Training Lieutenants meet the cri-

teria for this exemption. As with Captains and Field Lieutenants, Training Lieutenants are paid on a salary basis as that term is interpreted in *Auer*. The administrative duties test is satisfied if (1) the employee's primary duty consists of "office or nonmanual work directly related to management policies or general business operations of his employer," 29 C.F.R. §541.2(a)(1), and (2) this duty "includes work requiring the exercise of discretion and independent judgment," *id.* §541.2(e)(2). The district court found that

> the EMS Training Lieutenant develops, coordinates, implements and conducts EMS training programs. The Lieutenant also prepares lesson plans and training aids, supervises delivery of training and tests and evaluates new equipment. It is further undisputed that the EMS Training Lieutenant spends more than 50 percent of his time on administrative duties.

The district court properly concluded that Training Lieutenants' duties "are directly related to the operation of the EMS [D]ivision" and are "essential to the management of the Fire Department." Thus, the primary duties of Training Lieutenants are indisputably "office or nonmanual work directly related to management policies or general business operations" of the Fire Department. *See* 29 C.F.R. §§541.2 & 541.206(b).

Nonetheless, the district court declined to apply the administrative exemption from overtime to Training Lieutenants, finding that there was insufficient evidence that these employees' responsibilities include "work requiring the exercise of discretion and independent judgment." *See* 29 C.F.R. §541.2(e)(2). We disagree. The regulations indicate that "the exercise of discretion and independent judgment involves the comparison and the

evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." 29 C.F.R. §541.207(a). It is apparent that the primary tasks of Training Lieutenants necessitate the exercise of precisely such judgment and discretion. These primary tasks include not only developing and coordinating all EMS training programs but also administering tests and evaluating new equipment. The fact that some recommendations made by Training Lieutenants are subject to review by superior officers is no bar to application of the administrative exemption. 29 C.F.R. §541.207(e)(1). Therefore, we find that Training Lieutenants satisfy the criteria for the administrative exemption from overtime.

V.

As the record contains no evidence that the County's failure to properly administer its overtime pay system stemmed from wilful noncompliance with the FLSA, we affirm the district court's decision to apply a two-year rather than a three-year statute of limitations to plaintiffs' claims, and we uphold as well the trial court's refusal to award liquidated damages. At the same time, the County's noncompliance with the FLSA does not entitle it to invoke the defense of good faith conformity provided in the Portal-to-Portal Act, 29 U.S.C. §259(a).[5] As the district court noted, the Department of Labor Letter Ruling that the County says supports its treatment of EMTs provides no basis for determining whether the County's situation is similar to the employer to whom the letter was addressed. And, as the district court also

[5]We also affirm the district court's award of prejudgment interest to plaintiffs.

noted, "there is no evidence whatsoever that the County acted in reliance on any of the letter rulings cited."

VI.

We reverse the district court with respect to Captains, Field Lieutenants, and Training Lieutenants, finding that they satisfy both the salary test and the duties tests for the exemption from overtime for executive and administrative personnel. In all other respects, we affirm the judgment of the district court. We remand this case for further proceedings consistent with this opinion.

*AFFIRMED IN PART, REVERSED IN PART*

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED May 13, 1998

No. 96-1251
CA-90-2281-B

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR; MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; ~~SHARON M. HENRY; MICHAEZ~~ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARZYNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE

L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR.; CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE, JOHN G. ALEXANDER; STEVEN P. AMBROZEWICZ; DAVID A. BADWAK; DOUGLAS G. BOSLEY; DANIEL F. BOWEN; CLAUDIA L. CLARK; KENNETH T. CLAYPOOL; RANDALL W. CORBEL; JOHN A. COVINGTON; JOHN N. DENNETT; DANIEL J. DEPRIEST, JR.; GEORGE F. DICKEY, JR.; STEPHANIE DIETZ;

SUSAN E. EGAN; S. S. FEILINGER; ROLAND K. FINK, JR.; WALTER A. FORD, JR.; J. HARSH; MICHAEL P. HENRY; J. L. KIDWELL; S. LEFLER; KEITH A. LEFLER; J. MCANALLEN; ROBERT O'BRIEN; MICHAEL F.X. O'CONNELL, JR.; JEFFREY L. ORYE; KENNETH L. PARDOE; THOMAS A. PEZZA, JR.; A. J. PUGLIESE; EDWARD J. ROSS, III;

*Plaintiffs-Appellees*

UNITED STATES OF AMERICA,

*Intervenor*

*v.*

ANNE ARUNDEL COUNTY, MARYLAND

*Defendant-Appellant*

---

CITY OF BALTIMORE, MARYLAND

*Amicus Curiae*

No. 96-1280
CA-90-2281-B

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR;

MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; SHARON M. HENRY; MICHAEZ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARZYNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR.; CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM

H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE, JOHN G. ALEXANDER; STEVEN P. AMBROZEWICZ; DAVID A. BADWAK; DOUGLAS G. BOSLEY; DANIEL F. BOWEN; CLAUDIA L. CLARK; KENNETH T. CLAYPOOL; RANDALL W. CORBEL; JOHN A. COVINGTON; JOHN N. DENNETT; DANIEL J. DEPRIEST, JR.; GEORGE F. DICKEY, JR.; STEPHANIE DIETZ; SUSAN E. EGAN; S. S. FEILINGER; ROLAND K. FINK, JR.; WALTER A. FORD, JR.; J. HARSH; MICHAEL P. HENRY; J. L. KIDWELL; S. LEFLER; KEITH A. LEFLER; J. MCANALLEN; ROBERT O'BRIEN; MICHAEL F.X. O'CONNELL, JR.; JEFFREY L. ORYE; KENNETH L. PARDOE; THOMAS A. PEZZA, JR.; A. J. PUGLIESE; EDWARD J. ROSS, III;

*Plaintiffs-Appellants*

UNITED STATES OF AMERICA,

*Intervenor*

*v.*

ANNE ARUNDEL COUNTY, MARYLAND

*Defendant-Appellee*

---

CITY OF BALTIMORE, MARYLAND

*Amicus Curiae*

---

On Petition for Rehearing
with Suggestion for Rehearing In Banc

---

Appellant cross-appellee filed petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

---

# APPENDIX F

## PERTINENT REGULATIONS

**CODE OF FEDERAL REGULATIONS**
**TITLE 29 – LABOR**
**SUBTITLE B – REGULATIONS RELATING TO LABOR**
**CHAPTER V – WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR**
**SUBCHAPTER A – REGULATIONS**
**PART 553 – APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE**
**AND LOCAL GOVERNMENTS**
**SUBPART C – FIRE PROTECTION AND LAW ENFORCEMENT EMPLOYEES OF PUBLIC AGENCIES**
**EXEMPTION REQUIREMENTS**

**§553.210 Fire protection activities.**

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing,

attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, batallion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as maintenance and office personnel who do not fight fires on a regular basis. It may include such employees during emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this sec-

tion. Additionally, for those persons who actually engage in those fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

* * *

**§553.212 Twenty percent limitation on nonexempt work.**

(a) Employees engaged in fire protection or law enforcement activities as described in §§553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. (See §553.30.) The performance of such work does not affect the application of the section 13(b)(20) or 7(k) exemptions with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

* * *

**§553.215 Ambulance and rescue service employees.**

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, [sic] duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in §553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered and nonexempt employees. This would include, for example, employees of public agencies engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

## APPENDIX G

### PERTINENT COUNTY CHARTER PROVISIONS PREAMBLE; SECTION 101; SECTION 547

**PREAMBLE:**

We, the People of Anne Arundel County, State of Maryland, in order to form a more orderly County government, establish separate legislative and executive branches, insure responsibility of and accountability for public funds, promote the general welfare and secure the benefits of home rule, do, in accordance with the Constitution and the laws of the State of Maryland, adopt, ordain and establish as our Charter and form of government this CHARTER OF ANNE ARUNDEL COUNTY, MARYLAND.

**SECTION 101:**

Anne Arundel County as it now exists constitutes a body corporate and politic. Under this Charter it shall have all rights and powers of local self-government and home rule as are now or may hereafter be provided or necessarily implied by this Charter and by the Constitution and laws of the State of Maryland.

**SECTION 547. Functions and duties of the Fire Department.**

The Fire Department shall be responsible for the administration of the affairs of the County in fire suppression, fire prevention, fire training, fire communications, emergency medical services, and any other duty as may be assigned by the County Executive or by law from time to time. Nothing herein shall permit the Fire Administrator to participate in the corporate affairs of any volunteer fire company.